

(21,740.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 260.

STUART LINDSLEY, APPELLANT,

v's.

NATURAL CARBONIC GAS COMPANY, WILLIAM S. JACK-  
SON, ATTORNEY GENERAL OF THE STATE OF NEW  
YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Subpoena .....	1	1
Return of marshal for southern district of New York .....	2	1
Return of marshal for northern district of New York .....	4	2
Subpoena .....	5	3
Appearance for Natural Carbonic Gas Co. ....	7	4
Frank H. Hathorn <i>et al.</i> .....	8	5
Willard Lester <i>et al.</i> .....	9	5
W. Edgar Woolley <i>et al.</i> .....	10	6
W. S. Jackson, attorney general of New York. ....	11	6
Amended bill of complaint .....	12	7
Demurrer of defendants Hathorn, Farnham, Ellis, Sheehan, Baker, Mabee, and Thurber .....	31	17
Demurrer of defendants McNulty, Woolley, Lester, Van Deusen, McQueen, Clement, Putnam, Kearney, Gage, Huestis, Goldsmith, and Hoos .....	37	20

	Original.	Print
Demurrer of William S. Jackson, attorney general of the State of New York.....	42	23
Opinion, Lacombe, J.....	44	24
Decree sustaining demurrers.....	45	25
Petition for appeal and allowance.....	48	26
Assignment of errors.....	50	27
Bond on appeal.....	52	28
Citation and service.....	58	28
Clerk's certificate.....	63	35



1 The President of the United States of America to Natural Carbonic Gas Company; William S. Jackson, as Attorney General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabree, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, individually and as members of the Citizens' Committee in charge of the movement to restore the Saratoga Mineral Springs and the prestige of Saratoga Springs as a national health resort, and Frank H. Hathorn, Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of July, A. D., 1908, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Stuart Lindsley, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you, of Two Hundred and Fifty Dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 3d day of June, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America, the one hundred and thirty-second.

JOHN A. SHIELDS, *Clerk*.

MORRIS & PLANTE,

*Solicitors for Complainant.*

2 The Defendants are required to enter appearance in the above cause, in the Clerk's Office of this Court, on or before the first Monday of July, 1908, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk*.

I hereby certify, That on the 4th day of June, 1908, at the City of New York, in my District, I personally served the within Subpoena in Equity upon the within-named defendants Spencer Trask at No. 52 William Street, N. Y. City; William M. Hoes at No. 69 Wall Street, N. Y. City; Edward W. Kearney at No. 132 East 13th Street, New York City; William D. Ellis at No. 48 West 57th Street, New York City, and James M. Andrews at No. 48 West 57th Street, New York City by exhibiting to each of them the within original and at the same time leaving with each of them a copy for each thereof.

I hereby further certify, That on the 4th day of June, 1908, at the City of New York, in my District, I served the within Subpœna in Equity upon the within-named defendant William S. Jackson as Attorney General of the State of New York, by exhibiting to Ambrose Sutcliff, party in charge of the office at No. 299 Broadway, New York City, the within original and at the same time leaving with him a copy thereof.

I hereby further certify, That on the 8th day of June, 1908, at the City of New York, in my District, I personally served the within Subpœna in Equity upon the within named defendant William E. Wooley at Hotel Marie Antoinette, Broadway S. W. Cor. 67th Street, N. Y. City the within original, and at the same time leaving with him a copy thereof.

3 I hereby further certify that at the same time and place I left with each of the above named defendants a copy of Bill of Complaint in this suit.

The within-named Julius H. Caryl not found in my district.

WILLIAM HENKEL,  
*United States Marshal, S. D. N. Y.*

Dated New York, June 8th, 1908.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jun- 8, 1908, John A. Shields, Clerk.

4 UNITED STATES OF AMERICA,  
*Northern District of New York, ss:*

I hereby certify that I served the annexed subpœna upon James D. McNulty, George A. Farnham, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabée, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and Frank H. Hathorn, by delivering to and leaving with each of said persons personally a true copy of said subpœna on the 5th day of June, 1908, at the Village of Saratoga Springs, County of Saratoga, New York, and at the time of such service I exhibited to said James McNulty, George A. Farnham, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabée, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and Frank H. Hathorn the original subpœna with the Seal of the Court attached thereto under the hand of the Clerk.

I hereby further certify that I served the annexed subpœna upon the Natural Carbonic Gas Company, by delivering to and leaving with Clarence E. Reid, the General Manager of said Natural Carbonic Gas Company, personally, a true copy of said subpœna on the 5th day of June, 1908, at the Village of Saratoga Springs, Saratoga County, New York, and at the time of such service I exhibited to said Clarence E. Reid, as Manager of the Natural Carbonic Gas Com-

pany, the original subpoena with the Seal of the Court attached thereto under the hand of the Clerk.

C. D. MACDOUGALL,  
U. S. Marshal,  
By ELMER E. BELDEN,  
Deputy Marshal.

*Marshal's Fees.*

Service .....	\$54.00
Mileage .....	.12
	<hr/>
	\$54.12

- 5 The President of the United States of America to Natural Carbonic Gas Company; William S. Jackson, as Attorney General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabce, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Individually and as Members of the Citizens' Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of July, A. D., 1908, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Stuart Lindsley, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you, of Two Hundred and Fifty Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 3d day of June, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America, the one hundred and thirty-second.

JOHN A. SHIELDS, *Clerk.*

MORRIS & PLANTE,

*Solicitors for Complainant.*

- 6 The Defendants are required to enter appearance in the above cause, in the Clerk's Office of this Court, on or before the first Monday of July, 1908, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

(Endorsed.)

I, John A. Shields, Clerk of the United States Circuit Court Southern District of New York, do hereby certify that the within is a true copy of the writ sued out of the U. S. Circuit Court for the Southern District of New York, June 3, 1908.

[SEAL.]

JOHN A. SHIELDS,

*Clerk U. S. Circuit Court, Southern District of New York.*

U. S. Circuit Court, Southern District N. Y., Filed Jun- 20, 1908.  
John A. Shields, Clerk.

7 Circuit Court of the United States, Southern District of New York.

In Equity.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clements, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabey, Windsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Individually and as Members of the Citizens' Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Defendants.

To John A. Shields, Esq., Clerk of the U. S. Circuit Court for the Southern District of New York:

You will please enter our appearance for the defendant Natural Carbonic Gas Company in the above entitled suit.

Yours &amp;c.,

THOMAS &amp; OPPENHEIMER,

*Solicitors for Defendant Natural Carbonic Gas Company,  
No. 60 Wall Street, Borough of Manhattan, New York,  
New York.*

New York, June 15, 1908.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 6, 1908, John A. Shields, Clerk.

8 Circuit Court of the United States, Southern District of New York,

In Equity.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clements, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabce, Windsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Individually and as Members of the Citizens' Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Defendants.

To the Clerk of the Above Entitled Court:

You will please enter our appearance as solicitors for the defendants, Frank H. Hathorn, George A. Farnham, William D. Ellis, Cornelius Sheehan, James H. Baker, Douglass W. Mabce and Charles D. Thurber.

Dated, July 6, 1908.

ROCKWOOD, SCOTT & McKELVEY,

378 Broadway, Saratoga Springs, N. Y.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul-6, 1908, John A. Shields, Clerk.

9 United States Circuit Court, Southern District of New York.

In Equity.

STUART LINDSLEY, Complainant,  
vs.

WILLARD LESTER and Others, Impleaded with THE NATURAL CARBONIC GAS COMPANY, Defendants.

To John A. Shields, Esq., Clerk of the U. S. Circuit Court for the Southern District of New York:

You will please enter my appearance for the defendants Willard Lester, Charles C. Van Deusen, Edward W. Kearney, William B. Gage, William B. Huestis, Benjamin J. Goldsmith, and James D. McNulty and William M. Hoes, in the above entitled suit.

Dated July 6, 1908.

Yours &c.,

CHARLES C. LESTER,  
*Solicitor for Defendants, 360 Broadway,  
Saratoga Springs, N. Y.*

Endorsed: Circuit Court of the U. S., Southern District of N. Y. Stuart Lindsley, Complainant, vs. William Lester and others impleaded with Natural Carbonic Gas Co., Defendants. Præcipe for Appearance. U. S. Circuit Court, Southern District of N. Y., Filed Jul- 6, 1908, John A. Shields, Clerk.

10 Circuit Court of the United States, Southern District of New York.

In Equity.

STUART LINDSLEY, Complainant,  
vs.

WILLARD LESTER and Others, Impleaded with the NATURAL CARBONIC GAS COMPANY, Defendants.

To John A. Shields, Esq., Clerk of the U. S. Circuit Court for the Southern District of New York:

You will please enter my appearance for the defendants W. Edgar Woolley, Henry S. Clement, Israel Putnam, D. Peter McQueen, in the above entitled suit.

Dated July 6, 1908.

Yours &c.,

CHARLES C. LESTER,  
*Solicitor for Defendants, 360 Broadway,  
Saratoga Springs, N. Y.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 6, 1908, John A. Shields, Clerk.

11 Circuit Court of the United States, Southern District of New York.

STUART LINDSLEY, Complainant,  
vs.

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney General of the State of New York; James D. McNulty and Others, Defendants.

To the Clerk of the Above Named Court:

Please enter my name as solicitor for the defendant, William S. Jackson, Attorney General of the State of New York, one of the defendants above named, in the above entitled cause.

Very respectfully,

WILLIAM S. JACKSON,  
*Attorney General of the State of New York.*

Office and Post Office Address, Capitol, Albany, N. Y.

Dated, New York, July 6th, 1908.

Endorsed: U. S. Circuit Court, Southern District of N. Y., Filed Jul- 6, 1908, John A. Shields, Clerk.

12

*Amended Bill of Complaint.*

Circuit Court of the United States, Southern District of New York.

In Equity.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY, WILLIAM S. JACKSON, as Attorney-General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabee, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and William M. Hoes, Individually and as Members of the Citizens Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Defendants.

13 To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

Stuart Lindsley, of Orange, State of New Jersey, as holder and owner of bonds and capital stock of the defendant, Natural Carbonic Gas Company, and in his own behalf and in behalf of all other bondholders and stockholders of the said Natural Carbonic Gas Company, similarly situated, brings this his amended bill of complaint against the Natural Carbonic Gas Company, a corporation organized and existing under and by virtue of the laws of the State of New York; William S. Jackson of Buffalo, who is the Attorney-General of the State of New York; James D. McNulty, George A. Farnham, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Henry S. Clement, Cornelius Sheehan, Israel Putnam, James H. Baker, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabee, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, each of whom is a citizen and resident of and liable to pay a tax in Saratoga Springs, Saratoga County, in the Northern District of New York; William E. Woolley, William D. Ellis, James M. Andrews, Spencer Trask, Edward W. Kearney, Julius H. Caryl, William M. Hoes, each of whom is a resident of the Borough of Manhattan in the City of New York, in the Southern District of New York, and each of whom is also assessed for and liable to pay and has within one year paid a tax in the Town of Saratoga Springs; and John Don, a resident of Troy, Rensselaer County, in the Northern District of New York, and a taxpayer and liable to pay a tax, and who within one year has paid a tax in Saratoga Springs, New York; and Frank H. Hathorn, who is a citizen and resident of Saratoga Springs, in the

14



Northern District of New York, and who is a taxpayer and liable to pay tax and has paid a tax in the Village and Town of Saratoga Springs within one year; and, thereupon, your orator alleges and complains and says:

I. That your orator is a citizen of the State of New Jersey and a resident of Orange, in said State, and is the owner and holder of five first mortgage gold coupon bonds of the par value and actual value of \$500 each of the Natural Carbonic Gas Company, and is the owner and holder of 19 ten-year six per cent. sinking fund gold debenture bonds of said company, five of said 19 bonds being of the par and actual value of \$100 each, and 14 of the par and actual value of \$500 each, and is the owner of thirty-five shares of the preferred capital stock of said company of the par and actual value \$100 each, and 27 shares of the common capital stock of said company of the par and actual value of \$100 each.

II. That the defendant Natural Carbonic Gas Company is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office for the transaction of its business in the Village of Saratoga Springs, in this State. That said corporation was incorporated under the Business Corporations Law of the State of New York on the 31st day of October, 1905, and has been ever since such incorporation, and still is engaged in the business of extracting natural carbonic acid gas

15      from the land owned by it or from the water therein or thereunder, and compressing and selling the same for commercial purposes within and without the State of New York and has built up a large and lucrative business and industry in which there has been invested by its bondholders and stockholders, including your orator, over \$500,000. That said corporation is the owner of 21 acres of land in the Village of Saratoga Springs, State of New York, upon which it has erected expensive and valuable buildings, containing costly and valuable machinery for the operation of its said business. That said corporation was incorporated with a capital stock of \$1,000,000, consisting of \$300,000 preferred stock and \$700,000 common stock, as and became the successor to the Natural Carbonic Gas Company of New Jersey, a foreign corporation then operating in the Village of Saratoga Springs, and duly acquired and succeeded to all the property and rights and good will of said New Jersey corporation subject to mortgage given to secure an issue of \$400,000 par value of bonds, all issued and outstanding, (including those aforesaid owned and held by your orator) which bonds so secured the said Gas Company, the defendant herein, assumed and agreed to pay, and upon which bonds, including those owned by your orator, said defendant Gas Company has regularly paid interest at the rate of five per cent per annum without deduction or default, from the earnings and profits of its said gas business conducted as aforesaid upon and with its property in the Village of Saratoga Springs.

That the defendant Gas Company also assumed and agreed to pay an authorized issue of \$150,000 par value of debenture bonds as aforesaid, including those aforesaid owned and held by your orator,



16 of which \$131,600 were then or have since been issued and are now outstanding and upon which bonds, including those owned by your orator, said defendant has regularly paid interest to those entitled thereto, including your orator, at the rate of six per cent per annum without deduction or default, from the earnings and profits of its said gas business conducted as aforesaid, upon and with its property in the Village of Saratoga Springs.

That the aforesaid mortgage given to secure such issue of \$400,000 of bonds is placed upon and covers said 21 acres of land in Saratoga Springs and all buildings and machinery thereon situate and all personal property incident thereto.

That the said Gas Company has no property other than the aforesaid 21 acres of land situate in Saratoga Springs, and the buildings and machinery thereon and the tubes and other apparatus incident to and used in such business, and has no source of revenue or income other than from its gas and water business aforesaid, and except for such business has no means of earning sufficient money to pay the interest due upon its bonds aforesaid or sufficient to pay dividends upon its capital stock.

III. That said land owned by the defendant Gas Company as aforesaid contains natural carbonic acid gas in dry form and mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas which are percolating gases and waters.

IV. That said mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas are percolating waters and do not naturally flow to or upon the surface of said land and cannot be reached or brought to the surface for use without the use of pumps or similar or other artificial appliances.

17 V. That in order to reach the said mineral waters containing in solution natural carbonic acid gas in or under its said land the said defendant Gas Company has sunk or drilled or caused to be sunk or drilled, in and upon its lands, wells to the depth of several hundred feet. That such wells are made by boring or drilling into the rock, and are fitted with tubing and seals and lift pumps, by means of which the mineral waters in or under such land and the gases therein contained are raised to the surface. That such lift pumps do not suck the gases or waters from the land or exercise any persuasive force therein or exercise any force of compulsion upon waters in or under adjoining lands, but lift only to the surface, such waters and gases as flow by reason of the laws of nature into the wells so made upon its property.

That in Saratoga Springs, New York, are many persons and corporations owning lands in or upon which they claim to have natural mineral springs containing mineral waters holding in solution mineral salts and an excess of carbonic acid gas. That at the time the defendant Gas Company commenced such pumping on its said property in Saratoga Springs and for a considerable period prior thereto none of such so-called natural springs flowed naturally to the surface of the ground except the spring known as the "Carlsbad" spring, and none of such springs or wells has since that time flowed naturally to the surface, except the "Carlsbad" spring and

all the owners of such springs, except of the Carlsbad spring afore-  
said secure the waters therefrom by the use of pipes, seals and  
pumps similar in all respects, or similar in effect to the appliances  
used by the said defendant the Natural Carbonic Gas Company.

That when said mineral water is so raised to the surface the  
excess of carbonic acid gas escaping therefrom is caught by  
18 the Gas Company and compressed and sold and shipped  
throughout various States of the United States.

That no process is used to separate the gas from the water but only  
as much gas is so used as escapes naturally from the water and no  
part of said gas is wasted or permitted to escape, but all of such gas  
is caught and used.

VI. That prior to the enactment of the act hereinafter set forth,  
and during the year 1907, the said Gas Company installed, or  
caused to be installed, upon its said property in Saratoga Springs  
a bottling plant for the purpose of bottling the mineral waters ob-  
tained from its said property and shipping and selling the same  
throughout the United States of America and has since been also  
engaged in bottling, shipping and selling such waters for drinking  
purposes and for use by invalids and others, and has been engaged  
in building up and increasing its business of bottling and selling  
such waters and selling all of such water for which there is any  
market or demand.

VII. That in addition to the said Natural Carbonic Gas Company  
many other corporations and individuals are engaged in such busi-  
ness of extracting waters and gases from land in the Village of  
Saratoga Springs and State of New York, each of which including  
the *Natural Carbonic Gas Company* is doing a large and thriving  
business therein, and together they have made investments therein  
in the Town of Saratoga Springs alone of cash capital amounting  
to upwards of \$1,000,000.

VIII. That the following Act was passed by the Legislature of  
the State of New York on or about the 23rd day of April, and be-  
came a law of the State of New York, May 20th, 1908, with the  
approval of the Governor, to-wit:

19 An Act for the Protection of the Natural Mineral Springs  
of the State and to Prevent Waste and Impairment of its  
Natural Mineral Waters.

The People of the State of New York, represented in Senate and  
Assembly, do enact as follows:

Section 1. Pumping, or by any artificial contrivance whatsoever  
in any manner accelerating the natural flow or producing an un-  
natural flow of that class of mineral waters holding in solution  
natural mineral salts and an excess of carbonic acid gas from any  
well made by boring or drilling into the rock, or pumping, or by  
any artificial contrivance whatsoever in any manner accelerating  
the natural flow or producing an unnatural flow, of natural carbonic  
acid gas issuing from or contained in any well made by boring or  
drilling into the rock, is hereby declared to be unlawful. Pump-

ing, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow, of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow of, natural carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, by reason whereof the natural flow from any mineral spring or any mineral well belonging to any other person or corporation, is impeded, retarded, diminished, diverted, or endangered, or the quality of its waters is impaired, or the quantity of its carbonic acid gas or mineral ingredients diminished, is hereby declared to be unlawful. Pumping, or otherwise drawing by artificial appliance from any well made by boring or drilling into the rock, that class of

20 mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of, carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful. The doing of any act or thing whatsoever whereby the natural flow from any spring or well of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, is impeded, retarded, diminished, diverted, or endangered, or the quality of its water is impaired, or the quantity of its carbonic acid gas or mineral ingredients diminished, is hereby declared to be unlawful.

2. Any citizen of the State may maintain an action to restrain any person or corporation from committing any of the unlawful acts specified in section one of this act, in any city or town in which said citizen is assessed for and is liable to pay, or within one year before the commencement of the action has paid, a tax.

3. The Attorney-General may at any time, in the exercise of his discretion, bring and maintain an action in the name of the People of the State of New York, to restrain any person or corporation from any of the unlawful acts specified in section one of this act. It shall be the duty of the Attorney-General to institute and prosecute such an action, upon the written request of ten citizens of this State who are assessed for taxes therein and whose aggregate assessments amounts to not less than \$10,000, and who shall state, in writing, facts and circumstances showing any such unlawful act or acts and give an undertaking with sureties to be approved by a Justice

21 of the Supreme Court to indemnify the people against the costs of such action.

4. The provisions of Section 870 of the Code of Civil Procedure shall apply to any action brought under this act and no person shall be excused from answering on the ground that his examination would tend to convict him of crime, but such answer shall not be

used against him in any criminal prosecution for violating the provisions of this act.

5. Nothing in this act contained shall be construed to affect the Onondaga salt springs reservation, located in Onondaga County, or the springs of any county adjacent thereto.

6. This act shall take effect immediately.

IX. That prior to the enactment of such law the Natural Carbonic Gas Company as aforesaid was pumping from wells made by boring or drilling into the rock in its property in the Town of Saratoga in the State of New York, mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas and has ever since continued so to do, and had at all such times and still has a large amount of money invested in pumps and in a pumping system in its said premises.

X. That heretofore, and in or about the year 1907, the defendants, James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Heustis, Douglass W. Mabey, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and William M. Hoes formed themselves into a committee styling themselves  
22 the "Citizens Committee in Charge of the "Movement to Restore the Saratoga Mineral Springs and the "Prestige of Saratoga Springs as a National Health Resort;" that the avowed purpose of the formation of said committee was, and the purpose of its existence has continued to be, the passage of the act of the Legislature hereinbefore set out, and its enforcement when it became a law; that in pursuance of said purpose, many of the defendants, members of said Committee, with the concurrence and carrying out the wishes of all of them, attended the hearings accorded to the bill in its passage through the legislature and before the Governor, and repeatedly announced the intention and purpose of said Committee to enforce the provisions of said bill if it became a law, and since said bill became a law, said Committee by its chairman, the defendant, Willard Lester, and other of its members, has announced its intention to enforce said law, and to prevent the said Natural Carbonic Gas Company from exercising its property right of pumping, and to prevent it from using any means to bring the mineral water and gas upon or in its premises to the surface of the ground, and to prevent it from compressing carbonic acid gas taken from its premises, or from such mineral water.

XI. That the said Frank H. Hathorn is the owner of lands in the Village of Saratoga, in the State of New York, upon which he claims there was or is a well or spring from which flowed or now flows mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, and has co-operated in all things with said committee hereinbefore named, and has been equally active

with its members, and has made like threats of attempts and intention to enforce said law.

XII. That prior to the enactment of the Act aforesaid and to September, 1907, the said defendants composing said Citizens  
23 Committee, and the defendant Hathorn and other citizens and taxpayers of Saratoga, and owners of lands in said Village, upon or in which exist springs or wells containing mineral waters holding natural mineral salts and an excess of carbonic acid gas, and others, combined and schemed to prevent the Natural Carbonic Gas Company, and others engaged in like lawful business, from pumping mineral waters holding natural carbonic acid gas from, in or upon or under its or their property, and the said Citizens Committee as a result thereof did in or about September, 1907, demand and request the said Gas Company to desist from pumping and to discontinue its business, and the said Citizens Committee and the defendant Hathorn and other citizens and spring owners as aforesaid, did thereupon give out in speeches or interviews or pamphlets that they would take or procure to be taken, action to prevent the defendant Gas Company from continuing its lawful business and from pumping as aforesaid and did threaten to cause it to stop such pumping and did thereafter procure counsel to draft and prepare the Act aforesaid and did cause the same to be introduced in the Senate and Assembly of the State of New York, and were at all times and in all things instrumental as far as possible in securing and did at all times aid and assist, the passage thereof, and since the enactment of said Act aforesaid have threatened to take action and enforce said Act against the said defendant the Natural Carbonic Gas Company, and have threatened that they would cause the said defendant Company to cease its said business in Saratoga Springs aforesaid.

XIII. Your orator further presents that said Act hereinbefore set out in Paragraph VIII, hereof, is unconstitutional and  
24 void and of no effect whatever; that it violates the Constitution of the United States and particularly the Fifth and Fourteenth Amendments thereto, for the reason that it deprives the defendant Natural Carbonic Gas Company of its property and your orator of his property without due process of law, and takes the property of said company and your orator for public or private purposes, or both, without any compensation therefor and deprives said company and your orator of the equal protection of the laws.

XIV. That your orator is informed and believes that the said Jackson as Attorney-General of the State of New York, and the said defendants composing the said Citizens Committee and the said Hathorn, and many other citizens of the State of New York, and taxpayers of the Village of Saratoga Springs, intend to institute actions against the defendant Gas Company under said Act and to enforce the penalty thereof.

XV. That if ten citizens and taxpayers paying taxes on assessments of \$10,000 should request, as your orator is informed and believes they threaten to do, the Attorney-General to institute an action against said Gas Company the Attorney-General will have no

discretion in the matter but an absolute duty is imposed upon him by said Act to institute such action.

XVI. That the stocks and bonds aforesaid of the defendant Gas Company are owned among more than 350 persons residents and citizens of the States of New York, New Jersey, Rhode Island, Connecticut, Massachusetts and elsewhere, and many such bonds and certificates of stock have been pledged with and are now held by National and State banks and others as security for loans or upon business transactions.

25 XVII. That under and by virtue of the Constitution of the United States and particularly of the Fifth and Fourteenth Amendments thereto, the said Gas Company is entitled to the free, uninterrupted and reasonable use of its property, without restraint, and is entitled to the same use and enjoyment of its property as any other property owner or taxpayer in the State of New York, and to conduct its lawful business and to operate and use its property in connection therewith in such manner as it may see fit, provided it do so without injury to others, and is entitled to earn from the use of such property and from such business all that it lawfully may and a reasonable profit on the fair value of the property invested in its said business and any law passed by the Legislature of the State of New York, and any decree made by any Court pursuant to any such law, restraining the use of its property and which will not permit the said Gas Company to earn a reasonable profit upon the fair value of the property tangible and intangible, owned and used by it in its said business, takes the property of said Gas Company and of your orator without just compensation, deprives it and your orator of its and his property without due process of law, discriminates against it and him to the advantage and benefit of other corporations and persons in the State of New York and elsewhere, and denies to it and him the equal protection of the laws and is in violation of the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States; and the aforesaid Act of the Legislature of the State of New York, is for the foregoing reasons in violation of the said provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and is void.

XVIII. That the effect of the enforcement of said act will be to subject said Gas Company to a multiplicity of suits and to prevent the said Gas Company from fulfilling the purposes of its incorporation and from performing and continuing its business, and will prevent its carrying out lawful contracts entered into by it and in force at the time the said law was passed and became effective, and will subject said Company to suits and liability for damages for violation of such contracts and will dissipate its customers and destroy its business and prevent it from earning and paying any dividends on its stock and from earning and paying the interest on its said bonds, and will compel it to abandon its said business altogether, and to sacrifice its said plant and property for a small fraction of their cost and present value, and that a temporary interference with and cessation of its business will have a like effect.



XIX. That it is absolutely necessary for the reasonable, quiet and proper enjoyment and use of its said property that the said Gas Company should be permitted to continue its said business and to continue the pumping on its property as aforesaid, and that if it be restrained from continuing such pumping its business will be ruined and its property thereby rendered worthless and of no value, and it will be unable to earn and pay the interest and dividends on its bonds and stocks, and the bonds and stocks of your orator will thereby be rendered and become worthless and of no value, and the bonds and stocks of all other bondholders and stockholders of said Gas Company will likewise be rendered and become worthless and of no value, and irreparable injury will be done to said company and your orator; and your orator will have, and now has, as he is advised by counsel and avers and claims, no adequate remedy

27 at law, and that, as your orator is advised by counsel and avers and claims, there is no remedy except in equity to test adequately and completely the said Act, and that in the absence of such remedy in equity the penalty in said Act would be unreasonable and confiscatory, and would deprive the said Gas Company and your orator of its and his liberty and property without due process of law and without just compensation, and would likewise deny to it and him the equal protection of the laws in contravention of the Fourteenth Amendment and of the Fifth Amendment to the Constitution of the United States, on which account your orator invokes the jurisdiction of this Court to protect him and said Gas Company against the aforesaid threatened invasion by the defendants of its and his inherent rights under and guaranteed by the Constitution of the United States.

XX. That the business of said Natural Carbonic Gas Company which will be impaired by the threatened acts of the defendants, as hereinbefore stated, is of very great value, to-wit: of the value of more than \$50,000 a year, and the value of the bonds and stocks of said Gas Company, of which your orator is owner and holder, and which will be impaired and destroyed by the threatened acts of the defendants, is upwards of \$10,000; and the value of the property of said Gas Company which will be likewise impaired and destroyed is upwards of \$1,000,000; and the amount involved in this suit is more than \$2,000.

To the end therefore that your orator may have the relief which he can only obtain in a Court of Equity and that the defendants

28 may each answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orator, who now prays:

1. That it be adjudged and decreed that the aforesaid Act, more fully and at length set forth in paragraph VIII hereof, "An Act for the Protection of the Natural Mineral Springs of the State and to prevent Waste and Impairment of its natural waters," is illegal and void because in contravention of the fifth and fourteenth amendments to the Constitution of the United States as aforesaid, in that it deprives your orator and the Natural Carbonic Gas Company of

liberty and property without due process of law, and without compensation and denies to your orator and the said Gas Company equal protection of the laws.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which would result from the threatened enforcement of such Act and that such injury would be irreparable.

3. That it be adjudged and decreed that your orator be granted writs issuing out of and under the seal of this Honorable Court against the Natural Carbonic Gas Company restraining it from in any wise obeying, observing or conforming to the provisions, commissions, injunctions and prohibitions of said alleged Act, and enjoining the other defendants herein named, and each of them, and each of their officers, agents, servants and employees, and any and every person acting under and by virtue of the authority of the said Act, from in any way enforcing, or attempting to enforce, the said Act, or any of the provisions thereof, against your orator

29 or against the Natural Carbonic Gas Company, and that under the provisions of Section 718 of the Revised Statutes of the United States a restraining order may be granted against the defendants, and each of them, their officers, agents, servants and employees, restraining them until your Honorable Court shall determine upon motion and hearing whether a temporary injunction with like effect shall not be granted "pendente lite."

4. That your orator further prays that if at any time hereafter, prior to the final hearing hereof, any other person or citizen in the State of New York, or Village of Saratoga, shall attempt to enforce the provisions of said Act, or otherwise act or proceed thereunder, such persons, or some of them on behalf of all, be made parties defendant hereto, and each of them be enjoined and restrained as herein prayed; and that your orator have such other and further or different relief as to the Court may seem just and proper and the nature of the case may require.

5. Your orator further prays that your Honors grant your orator a writ of subpœna "de respondendum" issuing out of and under the seal of this Honorable Court, to be directed to the said defendants commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to appear before your Honors and this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet. And also that a writ of provisional injunction to the same purport, tenor and effect as hereinbefore set forth and appears, be granted during the pendency of this action. And your orator will ever pray, etc.

30

(Signed)

STUART LINDSLEY,  
MORRIS & PLANTE,

*Solicitors for Complainant, 135 Broadway,  
Borough of Manhattan, New York City.*

ROBERT C. MORRIS,  
GUTHRIE B. PLANTE,  
*Of Counsel.*



UNITED STATES OF AMERICA,  
*Southern District of New York,*  
*County of New York, ss:*

Stuart Lindsley, being first duly sworn, deposes and says, that he is the complainant named in the foregoing bill of complaint and who has subscribed to the same; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

(Sd.)

STUART LINDSLEY.

Sworn to before me this 17th day of June, 1908.

[SEAL.]

KATHERINE M. ABRENS,  
*Notary Public, Kings Co., N. Y. (No. 12).*

Certificate filed in New York Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jun- 18, 1908. John A. Shields, Clerk.

31 Circuit Court of the United States, Southern District of New York.

STUART LINDSLEY, Complainant,  
 against

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney-General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry B. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabec, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Individually and as Members of the Citizens Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort; and Frank H. Hathorn, Defendants.

32 To the Honorable Judges of the Circuit Court of the United States for the Southern District of New York:

*Demurrer of the Above Named Defendants, Frank H. Hathorn, George A. Farnham, William D. Ellis, Cornelius Sheehan, James H. Baker, Douglass W. Mabec, and Charles D. Thurber, to the Amended Bill of Complaint of the Above Named Complainant.*

These defendants, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint contained to be true in such manner

and form as the same are therein set forth and alleged, demur to the said amended bill.

And for cause of demurrer show:

First. That it appears by said amended bill that the complainant has no legal capacity to maintain this suit for the following reasons:

1. The complainant has not alleged or shown in said amended bill of complaint that he is the holder of any of the bonds or stock of the defendant, Natural Carbonic Gas Company, nor are any facts stated in said bill of complaint from which it may be inferred that the complainant is the holder of any such stock or bonds.

2. No valid contract is alleged or shown in said amended bill of complaint whereby the defendant, Natural Carbonic Gas Company, assumed or became liable to pay any of the bonds mentioned in said bill of complaint.

3. It is not alleged or stated in said amended bill of complaint that the complainant is a creditor of the defendant, Natural Carbonic Gas Company, nor are any facts therein stated or alleged from which it may be inferred that the complainant is a creditor of said company.

33 Second. That it appears by complainant's own showing by the said amended bill that he is not entitled to the relief prayed for by said bill against these defendants for the following reasons, among others:

1. It appears by the said bill of complaint that the threatened injury complained of is an alleged injury to the rights and interests of the defendant, Natural Carbonic Gas Company, and said Natural Carbonic Gas Company is shown by said amended bill to be competent and able to protect its rights and to have an adequate remedy at law.

2. It is not shown by said amended bill that the defendant, Natural Carbonic Gas Company, is under any disability to sue or that it has refused to sue or that any demand has been made upon it to sue.

3. The complainant does not show in his said bill that he has requested any action on the part of the corporation or its managing directors or trustees or that he has made any effort to obtain such action.

4. The complainant does not show that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

5. The complainant does not show that the maker of the bonds mentioned in the bill of complaint is not responsible and financially able to pay said bonds when they mature and the interest thereon as it accrues in accordance with the terms of said alleged obligations.

6. The complainant does not show in his bill of complaint that the mortgage mentioned therein is not full, ample and adequate security for the amount due and to become due thereon and for the amount of principal and interest due and to become due upon the complainant's bonds.

34 7. The complainant has failed to show in his bill of complaint any reason why he should be permitted to interpose and enforce the rights and remedies belonging to the defendant, Natural Carbonic Gas Company.

Third. That said amended bill does not comply with Equity Rule 94 in the following particulars:

1. Said amended bill of complaint is brought by one of the stockholders in a corporation, the Natural Carbonic Gas Company, against said corporation and other parties, founded on alleged rights which may be asserted by the corporation, and said bill does not contain an allegation that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

2. Said amended bill does not set forth with particularity the efforts of the complainant to secure such action as he desires on the part of the managing directors or trustees or shareholders of said corporation, or the causes of his failure to obtain such action.

Fourth. That it appears by said amended bill that the Act of the Legislature of the State of New York set forth in said amended bill, and to prevent the enforcement of which said bill is filed, is not unconstitutional or invalid for any cause, but that, on the contrary, the said Act is in fact a valid and constitutional law, which should be enforced and upheld.

Fifth. That it appears by the said amended bill that the Act of the Legislature of the State of New York set forth in said amended bill is a criminal statute of said State, the enforcement of which will not be enjoined by a Court of Equity.

35 Sixth. That it appears upon the face of said amended bill that the complainant has an adequate remedy at law.

Seventh. That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defendants.

Wherefore, These defendants demand the judgment of this Honorable Court whether they, or either of them, shall be compelled to make any further or other answer to the said bill, or to any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

ROCKWOOD, SCOTT & McKELVEY,

*Solicitors for Defendants, Frank H. Hathorn, George A. Farnham, William D. Ellis, Cornelius Sheehan, James H. Baker, Douglass W. Mabce and Charles D. Thurber.*

Office and Post Office Address, 378 Broadway, Saratoga Springs, N. Y.

We Hereby Certify that the foregoing demurrer is in our opinion well founded in point of law.

Saratoga Springs, N. Y., July 29th, 1908.

ROCKWOOD, SCOTT & McKELVEY,

*Solicitors for said Defendants,*

By L. B. McKELVEY.

36 STATE OF NEW YORK,  
County of Saratoga, ss:

Frank H. Hathorn, being first duly sworn, deposes and says: I am one of the defendants named in the amended bill of complaint herein, and I am familiar with the matters and things therein stated. The foregoing demurrer is not interposed for delay.

FRANK H. HATHORN.

Subscribed and sworn to before me this 29th day of July, 1908.

GEO. H. STENACHER,  
Notary Public.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 30, 1908. John A. Shields, Clerk.

37 Circuit Court of the United States, Southern District of New York.

STUART LINDSLEY, Complainant,  
vs.

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney-General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabec, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and William M. Hoes, Individually and as Members of the Citizens Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Southern District of New York:

38 Demurrer of the above named defendants, James D. McNulty, William E. Woolley, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Henry S. Clement, Israel Putnam, Edward W. Kearney, William B. Gage, William B. Huestis, Benjamin J. Goldsmith, and William M. Hoes, to the amended bill of complaint of the above named complainant.

These defendants, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said complaint contained to be true in such manner and form as the same are therein set forth and alleged, demur to the said amended bill.

And for cause of demurrer show:

First. That it appears by said amended bill that the complainant has no legal capacity to maintain this suit for the following reasons:

1. The complainant has not alleged or shown in said amended bill of complaint that he is the holder of any of the bonds or stock of the defendant, Natural Carbonic Gas Company, nor are any facts stated in said bill of complaint from which it may be inferred that the complainant is the holder of any such stock or bonds.

2. No valid contract is alleged or shown in said amended bill of complaint whereby the defendant, Natural Carbonic Gas Company, assumed or became liable to pay any of the bonds mentioned in said bill of complaint.

3. It is not alleged or stated in said amended bill of complaint that the complainant is a creditor of the defendant, Natural Carbonic Gas Company, nor are any facts therein stated or alleged from which it may be inferred that the complainant is a creditor of said company.

Second. That it appears by complainant's own showing  
39 by the said amended bill that he is not entitled to the relief prayed for by said bill against these defendants for the following reasons, among others:

1. It appears by the said bill of complaint that the threatened injury complained of is an alleged injury to the rights and interests of the defendant, Natural Carbonic Gas Company, and said Natural Carbonic Gas Company is shown by said amended bill to be competent and able to protect its rights and to have an adequate remedy at law.

2. It is not shown by said amended bill that the defendant, Natural Carbonic Gas Company, is under any disability to sue, or that it has refused to sue, or that any demand has been made upon it to sue.

3. The complainant does not show in his said bill that he has requested any action on the part of the corporation or its managing directors or trustees, or that he has made any effort to obtain such action.

4. The complainant does not show that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

5. The complainant does not show that the maker of the bonds mentioned in the bill of complaint is not responsible and financially able to pay said bonds when they mature and the interest thereon as it accrues in accordance with the terms of said alleged obligations.

6. The complainant does not show in his bill of complaint that the mortgage mentioned therein is not full, ample and adequate security for the amount due and to become due thereon and for the amount of principal and interest due and to become due upon the complainant's said bonds.

7. The complainant has failed to show in his bill of complaint any reason why he should be permitted to interpose and enforce the rights and remedies belonging to the defendant, Natural Carbonic Gas Company.

40 Third. That said amended bill does not comply with Equity Rule 94 in the following particulars:

1. Said amended bill of complaint is brought by one of the stockholders in a corporation, the Natural Carbonic Gas Company, against said corporation and other parties, founded on alleged rights which may be asserted by the corporation, and said bill does not contain an allegation that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

2. Said amended bill does not set forth with particularity the efforts of the complainant to secure such action as he desires on the part of the managing directors or trustees or shareholders of said corporation, or the causes of his failure to obtain such action.

Fourth. That it appears by said amended bill that the Act of the Legislature of the State of New York set forth in said amended bill and to prevent the enforcement of which said bill is filed is not unconstitutional or invalid for any cause, but that, on the contrary, the said Act is in fact a valid and constitutional law, which should be enforced and upheld.

Fifth. That it appears by the said amended bill that the Act of the Legislature of the State of New York set forth in said amended bill is a criminal statute of said State, the enforcement of which will not be enjoined by a Court of Equity.

Sixth. That it appears upon the face of said amended bill that the complainant has an adequate remedy at law.

Seventh. That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defendants.

41 Wherefore, these defendants demand the judgment of this Honorable Court whether they, or either of them, shall be compelled to make any further or other answer to the said bill, or to any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

CHARLES C. LESTER.

*Solicitor and Counsel for Defendants James D. McNulty, William E. Woolley, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Henry S. Clement, Israel Putnam, Edward W. Kearney, William B. Gage, William B. Huestis, Benjamin J. Goldsmith, and William M. Hoes.*

Office and Post Office Address, 360 Broadway, Saratoga Springs, N. Y.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Saratoga Springs, N. Y., July 27, 1908.

CHARLES C. LESTER,

*Of Counsel for Defendants Named  
in the Foregoing Demurrer.*

STATE OF NEW YORK.

*County of Saratoga, ss:*

Willard Lester, being first duly sworn, deposes and says; I am one of the defendants named in the amended bill of complaint herein and I am familiar with the matters and things therein stated. The foregoing demurrer is not interposed for delay.

WILLARD LESTER.

Subscribed and sworn to before me this 28th day of July, 1908.

MICHAEL J. MULQUEEN,

*Notary Public.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Aug. 3, 1908. John A. Shields, Clerk.

42

*Demurrer of William S. Jackson.*

Circuit Court of the United States, Southern District of New York.

In Equity. No. 316.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY, WILLIAM S. JACKSON, as Attorney General of the State of New York; James D. McNulty, and Others, Defendants.

The demurrer of William S. Jackson as Attorney General of the State of New York, one of the defendants named in the bill of complaint herein, to the bill of complaint of Stuart Lindsley, the above named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said amended bill and for cause of demurrer shows:

1. That the complainant has not upon the face of his said bill made or stated such a case as does or ought to entitle him to any such discovery or relief in equity as is thereby sought and prayed for from and against this defendant.

2. That the said complainant has not, as appears by his said bill, made out any title to the relief thereby prayed.

3. That it appears upon the face of said bill of complaint that there is not sufficient ground for the interference of a court of equity.

4. That it appears upon the face of said bill of complaint  
43 that the subject of the suit is not within the jurisdiction of a court of equity.

Wherefore, and for divers other good causes of demurrer appear-



ing in the said bill of complaint, this defendant does demur thereto and humbly demands the judgment of the court, whether he shall be compelled to make any further or other answer to said bill of complaint and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

W. S. JACKSON,  
*Attorney General of the State of  
New York, Defendant.*

W. S. JACKSON,  
*Solicitor for William S. Jackson, as Attorney  
General of the State of New York, Defendant.*

WM. A. DEFORD,  
*Of Counsel.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Dated, New York, N. Y. July 20th, 1908.

WM A. DEFORD,  
*Of Counsel for Defendant.*

STATE OF NEW YORK,  
*Southern District of New York, ss:*

William S. Jackson, being duly sworn, deposes and says that he is the Attorney-General of the State of New York and one of the defendants named in the bill of complaint herein, and that the foregoing demurrer is not interposed for delay.

W. S. JACKSON.

Subscribed and sworn to before me this 20th day of July, 1908.

JOSEPH W. DARLING,  
*Notary Public, N. Y. Co.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 20, 1908, John A. Shields, Clerk.

44

*Opinion Sustaining Demurrer.*

United States Circuit Court, Southern District of New York.

STUART LINDSLEY  
vs.  
NATURAL CARBONIC GAS COMPANY.

LACOMBE, C. J.:

The question whether or not this statute (Chap. 429 Laws of 1908, New York) is constitutional depends upon the power and authority which the owner of land in this state possesses and may exercise over what lies beneath its surface. In view of the recent deliverance of the Court of Appeals on that proposition (*Hathorn v. Natural Carbonic Gas Co.* 194 N. Y. 326) the demurrer to the bill is sustained.



(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed May 4, 1909, John A. Shields, Clerk.

*Final Decree.*

At a Stated Term of the Circuit Court of the United States, Held in and for the Southern District of New York, at the Court Rooms of said Court, in the Post-Office Building, Borough of Manhattan, City of New York, on the 22nd Day of May, 1909.

Present: Honorable E. Henry Lacombe, Circuit Judge.

*In Equity.*

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY, WILLIAM S. JACKSON, as Attorney General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabey, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Individually and as Members of the Citizens' Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Defendants.

This case having come on to be heard at this term and having been argued by counsel and due deliberation having been had;

It is now, on motion of Rockwood, Scott & McKelvey, solicitors for the defendants Frank H. Hathorn and others, Charles C. Lester, Solicitor for James D. McNulty and others; and Hon. William S. Jackson, as Attorney General of the State of New York,

Ordered, adjudged and decreed that the demurrer of the defendant James D. McNulty and others; the demurrer of the defendants Frank H. Hathorn and others, and the demurrer of William S. Jackson as Attorney-General of the State of New York to complainant's said amended bill herein be, and the said several demurrers are, each sustained. And it is

Further ordered, adjudged and decreed that the complainant's said amended bill herein be, and the same hereby is dismissed as to each and every of the defendants herein named with three separate awards of costs to the defendants who have appeared herein and interposed demurrers, as aforesaid, to be taxed by the Clerk of this Court on notice.

Enter.

(Signed)

E. HENRY LACOMBE,

*U. S. Circuit Judge.*

Approved as to form.

NASH ROCKWOOD.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y.,  
Filed May 22, 1909—John A. Shields, Clerk.

47 United States Circuit Court, Southern District of New York.

STUART LINDSLEY, Complainant,  
against  
NATURAL CARBONIC GAS COMPANY and Others, Defendants.

Service of a copy of the within petition for appeal admitted this  
5th day of June, 1909.

ROCKWOOD, SCOTT & McKELVEY,  
*Solicitors for Defendants Frank H. Hathorn, George A.  
Farnham, William D. Ellis, Cornelius Sheehan, James  
H. Baker, Douglass W. Mabee, and Charles D. Thurber.*

CHARLES C. LESTER,  
*Solicitor for Defendants Willard Lester, Charles C. Van  
Duesen, Edward W. Kearney, William B. Gage, William  
B. Huestis, Benjamin J. Goldsmith, James D. McNulty,  
William M. Hoes, William E. Woolley, Henry S. Clem-  
ent, Israel Putnam, and D. Peter McQueen.*

THOMAS & OPPENHEIM,  
*Solicitors for Defendant Natural Carbonic Gas Company.*  
EDWARD R. O'MALLEY,

*As Attorney General of the State of New  
York, Defendant, in Person,*  
By ROCKWOOD, SCOTT & McKELVEY,  
*Of Counsel.*

48 *Petition of Appeal.*

Circuit Court of the United States, Southern District of New York.

STUART LINDSLEY, Complainant,  
against  
NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as At-  
torney General of the State of New York; James D. McNulty,  
William E. Woolley, George A. Farnham, William D. Ellis,  
James M. Andrews, Willard Lester, Charles C. Van Deusen, D.  
Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius  
Sheehan, Israel Putnam, John Don, James H. Baker, Edward W.  
Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, Wil-  
liam B. Huestis, Douglass W. Mabee, Winsor B. French, Charles  
D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Indi-  
vidually and as Members of the Citizens' Committee in Charge of  
the Movement to Restore the Saratoga Mineral Springs and the  
Prestige of Saratoga Springs as a National Health Resort, and  
Frank H. Hathorn, Defendants.

The above named complainant, Stuart Lindsley, conceiving him-  
self aggrieved by the decree made and entered on the 22nd day of

May, 1909, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, May 22nd, 1909.

MORRIS & PLANTE,  
*Solicitors for Complainant.*

49 The foregoing claim of appeal is allowed.  
Dated, New York, May 25th, 1909.

(Signed) E. HENRY LACOMBE,  
*Circuit Judge.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jun- 8, 1909, John A. Shields, Clerk.

50 *Assignment of Errors.*

Circuit Court of the United States, Southern District of New York.

### In Equity.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabey, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, Individually and as Members of the Citizens' Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Defendants.

The complainant prays an appeal from the final decree of this Court herein to the Supreme Court of the United States, and assigns for error:

First. That the said statute of the State of New York, Chapter 429 of the Laws of 1908, is in contravention to the constitution of the United States, especially of sec. 1 of Art. XIV thereof, in that it:

1. Deprives the complainant and the defendant Natural Carbonic Gas Company of liberty and property without compensation and without due process of law;

2. Discriminates unlawfully against one class of persons  
51 and property owners to its injury and for the benefit and  
profit of another class, as well as between individuals of the  
same class;

3. Discriminates unlawfully against certain localities;

4. Provides for the taking of private property for private purposes.

Second. That said act is in contravention of the Constitution of the State of New York, especially of sec. 6 of Art. 1 thereof.

Third. That the Court erred in sustaining the several demurrers of the defendants to the Bill as amended and supplemented and in dismissing the Bill.

Wherefore complainant prays that the decree of the said Circuit Court be reversed.

Dated, New York, May 22nd, 1909.

MORRIS & PLANTE,  
*Solicitors for Complainant.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed May 25, 1909, John A. Shields, Clerk.

52

*Bond on Appeal.*

Circuit Court of the United States, Southern District of New York.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY et al., Defendants.

Know all men by these presents, that we, Stuart Lindsley as principal and the American Bonding Company of Baltimore, a corporation organized and existing under the Laws of the State of Maryland, lawfully transacting business and having an office at No. 84 William Street, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Frank H. Hathorn, George A. Farnham, William D. Ellis, Cornelius Sheehan, James H. Baker, Douglass W. Mabree, and Charles D. Thurber, and James D. McNulty, William E. Woolley, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Henry S. Clement, Israel Putnam, Edward W. Kearney, William B. Gage, William B. Huestis, Benjamin J. Goldsmith and William M. Hoes, and William S. Jackson as Attorney-General of the State of New York, in the full and just sum of One thousand dollars (\$1,000.) to be paid to the said Frank H. Hathorn, George A. Farnham, William D. Ellis, Cornelius Sheehan, James H. Baker, Douglass W. Mabree and Charles D. Thurber and James D. McNulty, William E. Woolley, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Henry S. Clement, Israel Putnam, Edward W. Kearney, William B. Gage, William B. Huestis, Benjamin J. Goldsmith and William M. Hoes, and William S. Jackson as Attorney-General of the State of New

53      York, their certain attorneys executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of May, A. D., 1909.

Whereas, lately at a Circuit Court for the Southern District of New York in a suit depending in said Court between Stuart Lindsley, complainant, against Natural Carbonic Gas Company and others, defendants, a decree was rendered against the said Stuart Lindsley, and the said Stuart Lindsley having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said James D. McNulty and others, Frank H. Hathorn and others, and William S. Jackson as Attorney-General of the State of New York, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington within thirty days from the date of said citation, to wit: May 25th, 1909.

Now, the condition of the above obligation is such that if the said Stuart Lindsley shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

STUART LINDSLEY. [SEAL.]

AMERICAN BONDING COMPANY  
OF BALTIMORE,

By JAS. L. D. KEARNEY,

*Resident Vice-President.*

Sealed and delivered in presence of:

JOHN W. OCKFORD.

Attest:

WALLACE STEVENS,

[SEAL.] *Resident Assistant Secretary.*

54

Form 123-A.

Treasury Department, Division of Appointment.

Form 217.

*Form of Justification by Corporate Surety.*

(This form is to be used in connection with the Execution of official bonds when the surety thereon is a guarantee or surety Company, and this affidavit must be annexed to the bond.)

STATE OF NEW YORK,

*County of New York, ss:*

Personally appeared before me, Jas. L. D. Kearney, on this 25th day of May, one thousand nine hundred and nine, known to me

to be the Resident Vice-President of the American Bonding Company of Baltimore, the corporation described in and which executed the annexed bond of Stuart Lindsley, as surety thereon, and who being by me duly sworn, deposes and says that he resides at New York, in the State of New York; that he is the said Resident Vice-President of the American Bonding Company of Baltimore, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Stuart Lindsley is the corporate Seal of the said American Bonding Company of Baltimore, and was thereto affixed by order and authority of the Executive Committee of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with Wallace Stevens and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said Wallace Stevens subscribed to said bond is in the genuine handwriting of said Wallace Stevens and was thereto subscribed by order and authority of the Executive Committee of the said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Eight Hundred and Three Thousand Five Hundred and Fifty Three Dollars and Twenty-Seven Cents (\$803,553.27.)

Deponent further says that Jas. L. D. Kearney of New York, in the State of New York, has been duly appointed as the agent of said Company to accept service of process of said Company in the Southern judicial district of New York, and is authorized to enter an appearance in behalf of said Company in any action, suit, or proceeding brought against it in said judicial district.

JAS. L. D. KEARNEY.

Sworn to, acknowledged before me, and subscribed in my presence, this 25th day of May, 1909.

[SEAL.]

EDWARD F. HEALEY,  
*Notary Public, New York Co.*

Cert. in Kings, Westch'r & Nassau Cos.

55 CITY AND COUNTY OF NEW YORK,  
*State of New York, ss:*

On May 25, 1909 before me personally came Jas. L. D. Kearney to me known, who being by me duly sworn, did depose and say that he resides in the City of New York, that he is the Resident Vice-President of the American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so fixed by order

of the Executive Committee of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided by law. And the said Jas. L. D. Kearney further said that he was acquainted with Wallace Stevens and knew him to be the Resident Assistant Secretary of said Company; that the signature of said Resident Assistant Secretary subscribed to the within instrument is the genuine handwriting of the said Resident Assistant Secretary and was subscribed thereto by like order of the Executive Committee of the Board of Directors, in the presence of him, the said Jas. L. D. Kearney.

[SEAL.]

EDWARD F. HEALEY,  
*Notary Public, New York County.*

American Bonding Company of Baltimore.

Extracts from minutes of a meeting of the Executive Committee of the Board of Directors of American Bonding Company of Baltimore, held at the office of the Company, at Baltimore, Maryland, on the 15th day of March, A. D. 1909.

At a regular meeting of the Executive Committee of the Board of Directors of the American Bonding Company of Baltimore, held in the office of the Company, at Baltimore, Maryland, on the 15th day of March, A. D. 1909, the following resolution was adopted:

"Resolved, That James L. D. Kearney, Hulbert T. E. Beardsley and Edward B. Southworth, Jr., of the city of New York, New York, be and hereby are appointed Resident Vice-Presidents of this Company at New York, New York, and are, and each of them is, hereby authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings, for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed or required; such guarantee, bonds and undertakings, however, to be attested in every instance by one of the following named persons: Charles H. Worcester, Edward F. Healey, Wallace Stevens or Vincent A. Cullen, who are hereby appointed Resident Assistant Secretaries of this Company at New York City, New York."

I, Wallace Stevens, Resident Assistant Secretary of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true and correct copy of a resolution of the Executive Committee of the Board of Directors of the American Bonding Company of Baltimore, and is the whole of said resolution.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the American Bonding Company of Baltimore, at the City of New York, N. Y., May 25, 1909.

WALLACE STEVENS,  
*Resident Assistant Secretary.*



*Statement of the Financial Condition of the American Bonding Company of Baltimore at the Close of Business December 31, 1908.*

**Assets.**

United States Government Bonds.....	\$51,500.00
State and Municipal Bonds.....	647,559.00
Railroad and Street Railway Bonds.....	410,630.00
Other Stocks and Bonds.....	124,275.00
Due from City of Camden, N. J.....	8,000.00
Outstanding Premiums (less commissions).....	144,619.33
Interest Accrued.....	7,829.93
Real Estate.....	12,742.56
Mortgage Loans.....	8,450.00
Accounts with Suspended Banks and Trust Companies (53,822.10).....	33,257.31
Cash in Office and Depositories.....	188,401.76
	<hr/>
	\$1,637,264.89

**Liabilities.**

Capital Stock.....	\$500,000.00
Due for Re-Insurance.....	13,098.40
Legal Reserve.....	495,755.11
Reserve for Losses and Contingencies.....	252,500.75
Reserve for 1909 Premium Tax (not due).....	15,000.00
Reserve for Unclaimed Return Premiums.....	1,973.36
Premiums paid in Advance.....	6,132.93
Surplus.....	352,804.34
	<hr/>
	\$1,637,264.89

CITY AND COUNTY OF NEW YORK,  
*State of New York, ss:*

I, Jas. L. D. Kearney, Resident Vice-President of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the Assets and Liabilities of said Company at the Close of Business, December 31, 1908.

In testimony whereof, I hereunto set my hand and affix the seal of the Company May 25, 1909.

JAS. L. D. KEARNEY,  
*Resident Vice-President.*

Subscribed and sworn to before me May 25, 1909.

[SEAL.]

EDWARD F. HEALEY,  
*Notary Public, New York County.*

56 (Endorsed:) Circuit Court of the U. S., Southern District of N. Y.—Stuart Lindsley, Complainant, against Natural Carbonic Gas Company, et al., Defendants.—Appeal Bond.—Mor-



ris & Plante, 135 Broadway, City.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District N. Y.—Filed May 25, 1909, John A. Shields, Clerk.

57 United States Circuit Court, Southern District of New York.

STUART LINDSLEY, Complainant,  
against

NATURAL CARBONIC GAS COMPANY and Others, Defendants.

STATE OF NEW YORK,

*County of New York, ss:*

Tracy P. Madden being duly sworn deposes and says: That he is upwards of the age of 21 years, and that on the 8th day of June, 1909, he served a true copy of the annexed citation on James M. Andrews at 48 West 57th Street, Borough of Manhattan, City of New York in said District by delivering said copy to the said James M. Andrews personally and leaving the same with him. That he knew the person so served to be the defendant in this action.

TRACY P. MADDEN.

Sworn to before me this 8th day of June, 1909.

[Seal Katharine M. Ahrens, Notary Public, Kings and  
New York Cos., N. Y.]

KATHARINE M. AHRENS,  
Notary Public, Kings Co., N. Y., #12.

Certificate filed in New York Co.

58 STUART LINDSLEY, Complainant,  
against

SPENCER TRASK, HARRY CROCKER, WINDSOR B. FRENCH, & JOHN  
DON, Defendants.

*Affidavit of Service of Citation.*

COUNTY OF SARATOGA, ss:

Clarence S. Curtis being duly sworn says: that he is thirty-nine years of age: that on the fifth day of June, 1909 at 2:30 P. M. he served the annexed citation on Spencer Trask at Yaddo, Union Ave., Saratoga Springs, N. Y.

That on the fifth day of June, 1909 at 1:15 P. M. he served the annexed citation on Harry Crocker at his office Gardner's Lane, Saratoga Springs, N. Y.

That on the fifth day of June, 1909 at 1:40 P. M. he served the annexed citation on Windsor B. French at Ford's Restaurant, Broadway, Saratoga Springs, N. Y.

That on the fifth day of June, 1909 at 2:55 P. M. he served the annexed citation on John Don at his residence, 677 North Broadway, Saratoga Springs, N. Y., the defendants in this action, by delivering a copy of same to each of such defendants personally, and leaving the same with each said defendant. He further says that he knew the persons served, as aforesaid, to be the persons mentioned and described in the said citation as the defendants in this action.

CLARENCE S. CURTIS.

Sworn to before me this 5th day of June, 1909.

FRANK GICK,  
*Notary Public, Saratoga County.*

59 United States Circuit Court, Southern District of New York.

STUART LINDSLEY, Complainant,  
against  
NATURAL CARBONIC GAS COMPANY and Others, Defendants.

Service of a copy of the within citation admitted this 5th day of June, 1909.

ROCKWOOD, SCOTT & McKELVEY,  
*Solicitors for Defendants Frank H. Hathorn, George A. Farnham, William D. Ellis, Cornelius Sheehan, James H. Baker, Douglass W. Mabey, and Charles D. Thurber.*

CHARLES C. LESTER,  
*Solicitors for Defendants Willard Lester, Charles C. Van Deusen, Edward W. Kearney, William B. Gage, William B. Huestis, Benjamin J. Goldsmith, James D. McNulty, William M. Hoes, William E. Woolley, Henry S. Clement, Israel Putnam, and D. Peter McQueen.*

THOMAS & OPPENHEIMER,  
*Solicitors for Defendant Natural Carbonic Gas Company.*  
EDWARD R. O'MALLEY,

*As Attorney General of the State of New York,*  
*Defendant, in Person,*  
By ROCKWOOD, SCOTT & McKELVEY,  
*Of Counsel.*

60 THE UNITED STATES OF AMERICA, ss:

The President of the United States to Natural Carbonic Gas Company; William S. Jackson, at Attorney-General of the State of New York; James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass M. Mabree, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith, and William M. Hoes, individually and as members of the Citizens Committee in charge of the movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort, and Frank H. Hathorn, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ pursuant to an appeal, duly allowed by the Circuit Court for the Southern District of New York, and filed in the clerk's office of said Court on the 25th day of May A. D. 1909, in a cause wherein Stuart Lindsley is appellant, and you are appellees, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

61 Witness the Honorable Melville W. Fuller, presiding justice of the Supreme Court of the United States this 25th day of May, A. D. 1909.

E. HENRY LACOMBE,  
*United States Circuit Judge for the  
Southern District of New York.*

62 [Endorsed:] Eq. 3/16. E. & A. C. 2908. Supreme Court of the United States. Stuart Lindsley, Appellant, against Natural Carbonic Gas Company and others, Appellees. (Original.) Citation. Morris & Plantet, Solicitors for Appellant, 135 Broadway, New York. U. S. Circuit Court Southern Dist. N. Y. Filed Jun- 8, 1909, John A. Shields, Clerk.

63 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to sixty-two inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Stuart Lindsley, Appellant, against Natural Carbonic Gas Company, William S. Jackson, as Attorney-General of the State of New York, James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clem-

ent, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglass W. Mabree, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and William M. Hoes, individually and as members of the Citizens Committee in charge of the movement to restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort; and Frank H. Hathorn, Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of June, 1909, and of the Independence of the United States the One Hundred and Thirty-third.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

64      At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, Held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on Wednesday, the 23rd Day of June, in the Year of Our Lord One Thousand Nine Hundred and Nine.

Present: The Honorable E. Henry Lacombe, Circuit Judge.

STUART LINDSLEY

vs.

NATURAL CARBONIC GAS Co. and Others.

Ordered that the time of the appellant in the above entitled cause in which to file the transcript of record on appeal be and the same is hereby extended to and including the 30th day of June, 1909.

E. HENRY LACOMBE,

*U. S. Circuit Judge.*

[Endorsed:] E. & A. C. 2908. Stuart Lindsley, vs. *National Carbonic Gas Co. et al.* Extension.

[Endorsed:] United States Supreme Court. Stuart Lindsley, Appellant, against Natural Carbonic Gas Company and others, Appellees. Transcript of record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 21,740. S. New York C. C. U. S. Term No. 260. Stuart Lindsley, appellant, vs. Natural Carbonic Gas Company; William S. Jackson, attorney general of the State of New York et al. Filed July 2d, 1909. File No. 21,740.

360  
No. 100

United States Court,

FILED

1900

JAMES H. HARRIS

# United States Supreme Court

STUART LINDSLEY,

*Appellant*

*vs.*

NATURAL CARBONIC GAS COMPANY,

JAMES D. McNULTY AND OTHERS,

*Appellees*

(COPY)

MOTION, AFFIDAVITS AND ORDER TO  
SHOW CAUSE.

MORRIS & PLANT,

*Attorneys for Appellant*

115 Broadway

New York

## Supreme Court of the United States.

STUART LINDSLEY,

Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY; WILLIAM S. JACKSON, as Attorney-General of the State of New York; JAMES D. McNULTY; WILLIAM E. WOOLLEY, GEORGE A. FARNHAM, WILLIAM D. ELLIS, JAMES M. ANDREWS, WILLARD LESTER, CHARLES C. VAN DEUSEN, D. PETER McQUEEN, SPENCER TRASK, HENRY S. CLEMENT, CORNELIUS SHEEHAN, ISRAEL PUTNAM, JOHN DON, JAMES H. BAKER, EDWARD W. KEARNEY, JULIUS H. CARYL, HARRY CROCKER, WILLIAM B. GAGE, WILLIAM B. HUESTIS, DOUGLASS W. MABEE, WINSOR B. FRENCH, CHARLES D. THURBER, BENJAMIN J. GOLDSMITH and WILLIAM M. HOES, individually and as members of the Citizens' Committee in charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort; and FRANK H. HATHORN,

Appellees.

Upon reading the petition and motion of the appellant dated the 30th day of June, 1909, the affidavit of Clarence E. Reid, verified the 29th day of June, 1909, the affidavits of Edlow W. Harrison and Guthrie B. Plante, both verified the 30th day of June, 1909, and the affidavit of William R. Hill, verified the 30th day of June,

1909, which said petition and affidavits are hereunto annexed, and upon the appeal taken to this Court by the appellant and allowed, and the assignment of errors filed therewith and the citation issued thereon with proof of service thereof upon the appellees above named, and upon the record on appeal in this cause now on file with the Clerk of this Court, and upon motion of Alton B. Parker, Esq., of counsel for the appellant, it is

ORDERED that the appellees above named and each of them, show cause before me in the Circuit Court Room of the Federal Post Office Building in the City of Albany, New York, at one o'clock in the afternoon of the 13th day of July, 1909, at the opening of Court on that day or as soon thereafter as counsel can be heard, why an order should not be made herein enjoining and restraining them and each of them except the Natural Carbonic Gas Company, until the hearing and determination of the appeal herein by this Court, from further enforcing or in any way attempting to enforce the said Statute, Chapter 429 of the Laws of 1908 of the State of New York, or any of the provisions or prohibitions thereof against the appellant or the said Natural Carbonic Gas Company, and restraining them and each of them except the said Natural Carbonic Gas Company from prosecuting or further proceeding in any action or actions commenced after the filing and service herein of the bill of complaint against the appellant or the said Natural Carbonic Gas Company, in the Courts of the State of New York, for the purpose of in any way enforcing or compelling obedience to the said Statute or any provision thereof, and from enforcing or attempting to enforce against said Natural Carbonic Gas Company or compelling its obedience to any order or judgment made in any such action by any Court of the State of New York or any Judge thereof, for the purpose of enforcing against said National Carbonic Gas Company or compelling its obedience to the said Statute or any provision thereof; and restraining the said Natural Carbonic Gas Company from in anywise obeying, observing or conforming to the provisions, injunctions and prohibitions of the said Statute and from in anywise obeying, observing or conforming to the provisions, prohibitions, injunctions and commands of any order or orders made by any Court of the State of New York or by a Judge thereof in any such action, by the appellees as aforesaid, for the purpose of enforcing or compelling obedience to said Statute or any provision thereof, and why such other and further order should not be



made in the premises as to the Court may seem just and proper ; and it is further

ORDERED that pending the hearing and determination of this application of the appellant, that the said appellees above named and each of them, except the Natural Carbonic Gas Company, be and they hereby are enjoined and restrained from further enforcing or in anyway attempting to enforce the said Statute, Chapter 429 of the Laws of 1908 of the State of New York or any of the provisions or prohibitions thereof, against the appellant or against the said Natural Carbonic Gas Company, and from prosecuting or further proceeding in any action commenced by them or any of them after the filing and service herein of the bill of complaint against said Natural Carbonic Gas Company, in the Courts of the State of New York, for the purpose of in anyway enforcing or compelling obedience to the said Statute or any provision thereof, and from enforcing or attempting to enforce against said Natural Carbonic Gas Company or compelling its obedience to any order made in any such action by any Court of the State of New York or by any Judge thereof, for the purpose of enforcing against said Natural Carbonic Gas Company or compelling its obedience to the said Statute or any provision thereof ; and it is further

ORDERED that until the hearing and determination of this application of the appellant, that said Natural Carbonic Gas Company be and hereby is restrained from in anywise obeying, observing or conforming to the provisions, injunctions and prohibitions of said Statute and from in anywise obeying, observing, or conforming to the provisions, prohibitions, injunctions and commands of any order or orders made by any Court of the State of New York or by any Judge thereof in any such action brought by the appellees or any of them as aforesaid, for the purpose of enforcing or compelling obedience to said Statute or any provision thereof ; and it is further

ORDERED that service of a copy of this order together with copies of the annexed petition and affidavits shall be deemed sufficient if made upon the appellees or their respective solicitors herein on or before Tuesday the 6th day of July, 1909.

Dated Altamont, New York, July 2nd, 1909.

R. W. PECKHAM,

Associate Justice of the Supreme Court of the United States.

## SUPREME COURT OF THE UNITED STATES.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY ; WILLIAM S. JACKSON, as Attorney General of the State of New York ; JAMES D. McNULTY, WILLIAM E. WOOLLEY, GEORGE A. FARNHAM, WILLIAM D. ELLIS, JAMES M. ANDREWS, WILLARD LESTER, CHARLES C. VAN DEUSEN, D. PETER McQUEEN, SPENCER TRASK, HENRY S. CLEMENT, CORNELIUS SHEEHAN, ISRAEL PUTNAM, JOHN DON. } No.  
JAMES H. BAKER, EDWARD W. KEARNEY, JULIUS H. CARYL, HARRY CROCKER, WILLIAM B. GAGE, WILLIAM B. HEUSTIS, DOUGLASS W. MABEE, WINSOR B. FRENCH, CHARLES D. THURBER, BENJAMIN J. GOLDSMITH, and WILLIAM M. HOES, individually and as members of the Citizens' Committee in charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort ; and FRANK H. HATHORN.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK.

**Motion to Advance.**

The appellant above named respectfully moves to advance this cause, and to set the same for argument at the earliest date convenient to the Court.

The appellant also respectfully asks that pending the hearing and determination of this appeal the defendants and appellees above named other than the Gas Company be stayed, and enjoined

from enforcing in anywise the provisions and prohibitions of the Statute hereinafter mentioned against the Natural Carbonic Gas Co. and that said Company may during such time be stayed and enjoined from complying therewith.

The matter involved briefly stated is as follows: By a statute of 1908 the State of New York prohibited the pumping of mineral water holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock and prohibiting the use of artificial appliances in such wells;

FIRST: When the result of such pumping or operation is to accelerate the flow or produce an unnatural flow of the water or gas;

SECOND: When the result of such pumping or operation is to lessen or impede the flow from any other spring or diminish or impair the quality or quantity of the carbonic acid gas or other mineral ingredients;

THIRD: When such pumping or operation is for the purpose of extracting the gas and vending it separate from the water; and

FOURTH: Prohibiting the doing of any act or thing whatsoever whereby the natural flow from any such well or spring is impeded or diminished or the quantity of gas diminished or the quality thereof impaired. (Laws of New York, 1908 Chap. 429.)

The statute declares the doing of any of the prohibited acts unlawful and provides that any person violating the statute may be enjoined at the suit of the Attorney-General or of a taxpayer.

The appellant brought this cause in the Circuit Court, filing his bill on behalf of himself and all other bond and stockholders of the defendant Natural Carbonic Gas Company, a corporation organized and existing under the laws of the State of New York owning land in the Village of Saratoga Springs from which it was extracting mineral water and gas for the purpose of vending the water and gas separately. The Bill charges that the defendant Attorney General of the State of New York and the other defendants, spring owners and members of a Saratoga Citizen Committee were threatening and attempting to enforce the provisions of said statute against the defendant Gas Company; that the statute in question is violative of Sec. 1 of Art. XIV. of the Constitution of the United States and unconstitutional and void as taking property without due process of law and without compensation and denying to the complainant and defendant Gas Company the equal protection of the law.

The defendants demurred to the amended bill filed, but prior to the hearing before the Circuit Court upon the demurrers, the Court of Appeals of the State of New York in *Hathorn vs. Natural Carbonic Gas Company*, 194 N. Y., 326, had considered and passed upon the statute here involved holding the first, second and fourth provisions to be unconstitutional, and the third constitutional.

The learned judge at Circuit in considering the constitutionality of the statute followed *Hathorn vs. Natural Carbonic Gas Co.* (*Supra*) and sustained the demurrers and granted a final decree dismissing the bill.

The appellant contends that at common law a land-owner has a property right in the water and gas percolating under and through his land and cannot be restrained from acquiring them. It is submitted that as the statute deprives the land-owner of his right to pump and acquire the water it takes his property contrary to the inhibitions of the Fourteenth Amendment to the Constitution and is therefore void in all its provisions, it being contended by appellant that the so-called "third" provision of the statute is equally as broad as the other three that were rejected by the New York Court of Appeals and therefore equally bad.

It can therefore be seen by the Court that the case raises a fundamental question of the greatest importance which has never been directly passed upon by this Court.

A number of cases are pending under the statute against various gas companies and spring owners of Saratoga Springs the result of which will affect property to the value of upwards of a million dollars. Since this suit was commenced two cases have been brought against the Natural Carbonic Gas Company based upon the statute in one of which a temporary injunction has been granted by the New York Supreme Court restraining the Gas Company from doing such acts as are condemned by the statute. All such cases were, however, commenced by the appellees after the commencement of this cause by the filing and service of the bill.

The property of the Gas Company in which there has been invested by complainant and other stock and bondholders, over half a million dollars is thereby threatened with destruction, its business will be dissipated and ruined and complainant and others similarly situated will suffer irreparable injury.

The property plant and appliances owned and operated by the defendant company in its gas and water business are not suitable for and cannot be used in any other business and will become of

little value if the company be not permitted to continue its present operations. Most of its business is covered with long term contracts with its customers so that if its business be stopped it will be forced to default on its contracts and be subjected to upwards of a thousand claims and suits for damage which would wipe out what little could be saved from the wreck of its plant. The stock and bonds would thus be rendered valueless and the holders would lose their entire investments.

When the defendant company was granted its charter by the State of New York with power to carry on this particular business, the acts now prohibited by chap. 429, Laws of 1908, were entirely lawful and not actionable at common law according to the rules laid down by the Courts of England and by the Courts of the various states of the United States.

In the Hathorn case the New York Court of Appeals has applied a new rule to the rights of property owners in underground percolating waters, the application of which by means of the enforcement of the statute will mean the destruction of the defendant company and irreparable injury to appellant.

The appellees contend that the statute is penal in its operation and effect and that each act committed in violation thereof being declared unlawful is punishable under the provision of the New York Penal Code by imprisonment for one year or a fine of \$500. or both. The defendant company is therefore threatened with a multiplicity of criminal prosecutions with resulting fines, the aggregate of which would soon ruin the company, and its officers and servants are threatened with imprisonment.

The business of the Gas Company is distinctly a summer business and the present time is its busiest season. If the other defendants and appellees are permitted to enforce the provisions and prohibitions of said statute against the defendant company prior to the hearing of the appeal herein by this Court the business of the Company will be destroyed, its property will be rendered worthless and complainant's investment therein in bonds and stock will likewise become worthless and of no value and said Company and complainant and all other stockholders and bondholders similarly situated will suffer irreparable loss and injury and if this Court should hold said statute to be unconstitutional and reverse the decree of the Circuit Court, such reversal and the decree of this Court thereon would be rendered ineffectual by the threatened acts of the said defendants. The purpose of such

decree of this Court would be thus defeated and appellant would obtain no relief therefrom.

The affidavits hereto annexed are submitted in support hereof and referred to for all intents and purposes as though herein set forth at length.

The argument of this appeal it is believed will be brief and will occupy much less than the time usually allowed by the court.

Appellant therefore respectfully prays this Court to advance this cause for argument so that the validity of said statute as tested under the provisions of Sec. 1, Art. XIV., of the Constitution of the United States may be finally determined by this Court before complainant's property is entirely destroyed, and that pending the hearing and determination thereof of this Court that the defendants and appellees aforesaid may be stayed and enjoined from prosecuting and enforcing against said Natural Carbonic Gas Co. and complainant the provisions and prohibitions of said statute.

June 30th, 1909.

ALTON B. PARKER,  
Of Counsel for Appellant.

MORRIS & PLANTE,  
Solicitors for Appellant.

## UNITED STATES SUPREME COURT.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY, JAMES D.  
McNULTY and others,  
Appellees.

STATE OF NEW YORK, }  
County of New York, } ss.

STUART LINDSLEY being duly sworn deposes and says: That he is the appellant above-named. That he is the owner of Twenty-five hundred Dollars (\$2500.) par value first mortgage, gold coupons, of the defendant Natural Carbonic Gas Company, and of Seventy-five hundred Dollars (\$7500.) par value of sinking fund debenture bonds of said Company, Thirty-five hundred Dollars (\$3500.) par value of the preferred capital stock of said Company, and Twenty-seven hundred Dollars (\$2700.) of the common capital stock of said Company.

That appellant caused this action to be brought in the Circuit Court of the United States for the Southern District of New York, in good faith for the purpose of protecting his property and property rights, and his interest by virtue of said bonds and stock in the defendant Company, its business and property, and on behalf of himself and all others similarly situated seeks to have Chap. 429 of the Laws of 1908 of the State of New York, declared unconstitutional and void, and to have the appellees herein except the Gas Company, enjoined and restrained from enforcing said statute against the appellant, and said Gas Company enjoined in anywise from obeying the provisions thereof.

That a decree was entered herein by said Circuit Court sustaining demurrers to said complainant's amended bill and dismissing such amended bill, and from such final decree appellant has



taken an appeal to this Court in good faith and intends to prosecute the same with the most diligent dispatch.

That appellant respectfully prays this Court to advance the cause out of its regular order and set the same down for hearing at an early date, and also respectfully prays this Court that an order may be made herein directing the appellee to show cause at the opening of the October 1909 term of this Court, why the cause should not be advanced out of its regular order for immediate hearing, or for hearing at such time as this Court may deem proper, and directing the appellee to show cause why an order should not be made herein restraining them and all of them except the said Gas Company from in anywise enforcing the provisions of said statute against appellant and the said Gas Company, pending the hearing and determination of this Court of the appeal herein, and appellant also prays that pending a hearing on this application the appellees and each of them, except said Gas Company, may be restrained from enforcing the provisions and prohibitions of said statute, and the said Gas Company restrained from in anywise obeying the same.

That appellant is familiar with the pumping and other operations carried on by the defendant Gas Company on its property at Saratoga Springs in connection with its water and gas business, and knows the nature and extent thereof.

That the defendant Gas Company is not pumping any unreasonable quantity of water or gas and is not accelerating or causing an unnatural flow thereof to the injury of any spring or well in Saratoga Springs or elsewhere.

That appellant is thoroughly familiar with the business affairs of the said Gas Company, and unless said Company be permitted to continue its business until the hearing and determination of this appeal, its business will be ruined and its trade dissipated, its property depleted in value, and appellant in said Company and all other bondholders and stockholders similarly situated with appellant will suffer irreparable damage and injury, and bond and stock will be rendered worthless and of no value.

That the property of the defendant Gas Company is not suitable for and cannot be used in any other business, and if it is not permitted to continue its operations as heretofore, its property will be worth one-fiftieth ( $\frac{1}{50}$ ) of its present value, and the complainant and the other bondholders and stockholders of the said Company

will suffer a loss on their investments of upwards of Five hundred thousand Dollars (\$500,000).

That no other or previous application for the relief herein sought has been made to this Court or any judge thereof.

STUART LINDSLEY.

Sworn to before me this 30th }  
day of June, 1909.

KATHARINE M. AHRENS,

[SEAL.]

Notary Public (No. 12),

Kings Co.,

N. Y.

Certificate filed in New York Co.

# UNITED STATES SUPREME COURT.

STUART LINDSLEY,

Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY, JAMES D.

McNULTY and others,

Appellees.

STATE OF NEW YORK, }  
County of New York, } ss. :

GUTHRIE B. PLANTE, being duly sworn deposes and says: That he is one of the firm of Morris & Plante, solicitors for the complainant and appellant herein.

That this cause was commenced by the filing of complainant's bill in the Circuit Court of the United States for the Southern District of New York on the 3rd day of June, 1908.

The Bill seeks to have Chapter 429 of the Laws of 1908 of the State of New York declared unconstitutional and to have the de-

defendants, other than the Gas Company, enjoined from enforcing its provisions and prohibitions against the complainant and the said Gas Company, and to enjoin the Gas Company from in any wise obeying the same.

On June 3rd, 1908, an order was granted directing the defendants to show cause why an injunction should not issue *pendente lite*, such order containing a temporary restraining clause enjoining the defendants as prayed in the Bill until the hearing upon such application. Subsequently upon an *ex parte* application such temporary restraining clause was vacated.

On June 18th, 1908, complainant's amended Bill was filed, and thereafter duly served on all defendants.

On the 29th day of June, 1908, the motion for injunction *pendente lite* was argued and submitted to the Honorable HENRY G. WARD, Circuit Judge, and by him denied on July 1st, 1908. (See 162 Fed. Rep., 954.)

That thereafter certain of the defendants filed their several demurrers to the amended Bill and the cause came on to be heard upon such demurrers before Honorable E. HENRY LACOMBE, Circuit Judge, on the 22nd day of April, 1909.

On the 4th day of May, 1909, Judge LACOMBE rendered the following opinion :

"The question whether or not this statute (Chap. 429, Laws of 1908, New York) is constitutional depends upon the power and authority which the owner of land in this state possesses and may exercise over what lies beneath its surface. In view of the recent deliverance of the Court of Appeals on that proposition (*Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y., 326) the demurrer to the bill is sustained."

On the 22nd day of May, 1909, final decree dismissing the amended Bill was signed by Judge LACOMBE and entered.

On the 25th day of May, 1909, Appellant filed a petition for appeal to this Court, which appeal was on the same day allowed by Judge LACOMBE at circuit. With the petition on appeal the appellant filed his assignment of errors and undertaking as required by the Statute in such case made and provided. A citation was thereupon duly issued and such citation and the various papers aforesaid were duly served upon the parties hereto.

Thereafter and on the 29th day of June, 1909, Appellant caused

the record on appeal to be duly transmitted to the Clerk of this Court and filed, and said appeal has now in all things been duly taken and perfected, and Appellant intends in good faith to bring said appeal on for argument before this Court at the earliest possible moment.

That subsequent to the commencement of this action the defendant and appellee Frank H. Hathorn commenced in the Supreme Court of the State of New York an action against the defendant Natural Carbonic Gas Company, wherein he sought to enforce the provisions of said statute against the defendant, and sought a permanent injunction restraining the defendant from extracting mineral waters and carbonic acid gas from its property by means of pumps and other artificial appliances.

A motion for a temporary injunction *pendente lite* was made in such action, and granted, and an order entered restraining the defendant from continuing its operations during the pendency of the action. An appeal was taken from said order through the Appellate Division to the Court of Appeals of the State of New York, the Court of Appeals holding three of the four provisions of the statute unconstitutional, and the fourth constitutional to the extent indicated in their opinion. (See Hathorn vs. Natural Carbonic Gas Company, 194 N. Y., 326.)

The Court of Appeals in its said opinion indicates that the defendant Gas Company can only be restrained from pumping when it causes an unreasonable acceleration of the water or gas to the injury of adjoining land owners, but notwithstanding, the Special Term of the Supreme Court, at the instigation of certain of the defendants and the said Hathorn is attempting to enforce the said injunction order against the defendant Gas Company in accordance with the literal wording of said remaining provision of the Statute, whereas said order, if valid and operative at all, is only valid to the extent indicated by the Court of Appeals.

That on the 25th day of June, 1909, an order was obtained in said action fining the defendant Gas Company \$250 and costs as for a contempt for a failure to cease its operations and discontinue pumping for the purpose of extracting and vending the gas separate from the water, notwithstanding that on the motion to punish for contempt, as a result of which such last mentioned order was entered, the defendant submitted affidavits which were uncontradicted and which, in the opinion of deponent, established beyond doubt that no injury was resulting to the plaintiffs Hathorn from

the defendant's operations. From said order fining for contempt the said Gas Company is proceeding to take an appeal.

Within a few weeks after the commencement of the Hathorn case an action was started against the Natural Carbonic Gas Company by The People of the State of New York, such action being brought by the Attorney General and, as deponent is informed and believes, at the instigation of the defendants forming the Citizens Committee of Saratoga Springs and the defendant Hathorn. That in such action last named plaintiffs applied for and obtained an injunction *pendente lite* similar in all respects to the injunction granted in the Hathorn case, but the order granting same was subsequently reversed upon an appeal to the Appellate Division of the Supreme Court (See 128 App. Div. 42).

Subsequently, and after the decision of the Court of Appeals in the Hathorn case, the plaintiffs The People of the State of New York, in the second action, moved before the Appellate Division for leave to renew at Special Term a motion for injunction *pendente lite*. This motion was denied upon condition that the defendant would withdraw its demurrer, serve an answer and stipulate to try the case at the May Albany Trial Term. These conditions were fully complied with by defendant, and the defendant at the opening of said May Trial Term was ready for trial, but, as deponent is informed and believes, plaintiffs were not ready and the case was marked "reserved" and not tried for that reason.

That thereafter the plaintiffs again moved before the Appellate Division for leave to renew their motion for injunction *pendente lite*, which motion was denied on the ground that under the order made upon the previous application for the same relief the Special Term had power to entertain such an application.

That, as deponent is informed and believes, the Attorney General on behalf of said plaintiff intends to and is about to move for an injunction *pendente lite* in such action restraining the defendant from pumping its wells and continuing its business operations.

That deponent has read the annexed affidavits of Clarence E. Reid, verified the 29th day of June, 1909, and the affidavits of William R. Hill and Edlow Harrison, both verified the 30th day of June, 1909, and from his knowledge of this case and from a careful investigation of the facts relating to the defendant Gas Company's operation and from the statements made to him by the officers of the defendant Company, and by expert hydraulic engineers, geologists and others, he believes all the statements therein made by said

appellants as to the operations of the defendant Company, and the nature and extent thereof and as to the injury and damage that would result to the defendant Company from an enforcement of the provisions and prohibitions of the said Statute to be in all respects true and correct.

That the defendants comprising the Citizens Committee at Saratoga Springs, the Attorney General of the State of New York, and the defendant Hathorn, as deponent is informed and believes, are threatening to take action and enforce said statute against said defendant Natural Carbonic Gas Company, and are threatening that they will cause the said defendant Company to cease its said business in Saratoga Springs. That the sources of deponent's information and the grounds of his belief are statements made to him by the counsel for the said defendants and by officers of the defendant Company and by other persons in Saratoga Springs.

That the defendant Company is not accelerating the flow of water or gas from its wells, nor causing an unnatural flow thereof, and is not causing any injury to any persons, property owners or spring owners in Saratoga Springs or elsewhere; is not injuring or causing any injury to any spring or springs or to the water or gas or mineral ingredients therein, all of which appears in detail in the annexed affidavits, and no loss or injury of any kind can result to the defendants, or any thereof, if they be stayed and enjoined from enforcing the provisions and prohibitions of said statute against the Appellant and the defendant Natural Carbonic Gas Company until such time as the appeal herein may be heard and determined by this Court.

That said injunction order in the case of Hathorn against Natural Carbonic Gas Company, *supra*, was granted solely upon the ground of a technical violation of the statute, and distinctly refused for any violation of common law rights or because of actual injury. Mr. Justice HOUGHTON, at Special Term, in granting the injunction (see 60 Misc., 340, at 344-345), said :

"I should not feel justified in granting a preliminary injunction (based on common law rights), especially where the springs are so widely separated and direct proof of interference is so meagre."

And the learned Justice then caused to be inserted in the order made by him granting an injunction the following provision :

“ all of which said injuries to plaintiff are deemed by the Court to have been caused from a violation of Chapter 429 of the Laws of 1908, and the injunction is granted upon the sole ground that the defendant is guilty of a violation of the provisions of said statute.”

That no proof has been shown of any actual injury by the Natural Carbonic Gas Company to any of the defendants or others from the operation of its said property and business in Saratoga Springs, and such charges of injury as were made in the aforesaid State Court cases were made chiefly in the formal language of the statute without support of or statement of facts of any kind.

That the State of New York does not own any property or any mineral springs or wells or any mineral water or gas producing properties in Saratoga Springs or the immediate vicinity, and owns no interest of any kind in any such properties therein, and no injury can result to the People of the State of New York if the Natural Carbonic Gas Company be permitted to continue its said operations.

That the order aforesaid made in said action Hathorn vs. Natural Carbonic Gas Company fining said Company for contempt is based upon a technical violation of the order of the court and of the statute,—the Court finding no actual damage or injury to the said Hathorns, as shown by the amount of the fine \$250 and costs. Such fine is the statutory penalty imposed under § 2284 of the Code of Civil Procedure of the State of New York as a punishment for a contempt where no actual loss or injury has been produced.

GUTHRIE B. PLANTE.

Sworn to before me this 30th }  
day of June, 1909. }

KATHARINE M. AHRENS,

[SEAL.]

Notary Public (No. 12).

Kings Co.,

N. Y.

Certificate filed in New York Co.



## UNITED STATES SUPREME COURT.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY, JAMES D.  
McNULTY and others,  
Appellees.

STATE OF NEW YORK, }  
County of New York, } ss. :

CLARENCE E. REID, being duly sworn, deposes and says : That he resides in the Village of Saratoga Springs and is the Vice-President and General Manager of the Natural Carbonic Gas Company, the defendant above named.

That deponent has been connected with said defendant since the incorporation of the Company on October 31st, 1905, and familiar with all its business done since that time.

That defendant is engaged in the business of extracting natural carbonic acid gas and mineral water from its property at Saratoga Springs, New York, and selling the same, and deponent is entirely familiar with all of its operations in said business and with the working of its property, including the extracting and compressing of gas and the extracting and bottling of mineral water.

That said defendant is the owner of twenty-one acres of land in the Village of Saratoga Springs, upon which it has erected expensive and valuable buildings containing costly and valuable machinery for the operation of its said business.

That said land owned by the defendant contains natural carbonic acid gas in dry form and mineral water holding in solution mineral salts and an excess of natural carbonic acid gas, which said water and gas percolate in and through defendant's said land but do not naturally flow to the surface and can only be reached and brought

to the surface for use by means of pumps or other artificial appliances.

That in order to reach the mineral water containing in solution an excess of natural carbonic acid gas percolating in or under its said lands defendant has sunk or drilled wells in or upon its lands, some or all of which are made by boring or drilling into the rock and are fitted with tubing and seals and lift pumps, by means of which the mineral waters in or under said lands and the gases therein contained are raised to the surface. That such lift pumps do not suck the gases or mineral waters from the land or exercise any pervasive force therein or exercise any force of compulsion upon waters in or under adjoining lands, but lift only to the surface such water and gas as flow by reason of the laws of nature into the wells so made upon its property. That said defendant does not in the operation of its said property, or by said pumping or use of artificial appliances, or by any means whatsoever, accelerate or increase the flow or cause an unnatural flow of said water and gas from the wells in or under its said property, and does not by the use thereof draw or obtain any unreasonable quantity of said water and gas, and does not accelerate or increase the flow or cause an unnatural flow of such water or gas in or upon its property to the injury of the owners of any adjoining land, or to the injury of the owners of any other lands in the Village of Saratoga Springs, or to the injury of the People of the State of New York, and does not by such acts, or any thereof, divert, destroy, diminish, impede or retard the flow of such water or gas in or under the lands of any other person or corporation in the Village of Saratoga Springs or elsewhere.

That the quantity of water and gas drawn and obtained by the said defendant, Natural Carbonic Gas Company, from its lands is less than the natural flow thereof, and said defendant has never at any time since it commenced the aforesaid operations on its property drawn or obtained more water or gas than naturally flowed by the laws of nature into the wells so made and existing upon its property, and at no time since the enactment of Chapter 429 of the Laws of 1908 of the State of New York, has the defendant done, or caused to be done, any act or thing whereby said mineral water or gas in or under the adjoining lands, or under any other lands in Saratoga Springs, has been diverted, impeded, retarded or diminished, or the quality of such water impaired or the quantity of its

mineral ingredients or gas diminished or the quality thereof impaired.

That when said water is so raised to the surface the excess of carbonic acid gas escaping therefrom is caught and compressed and liquified and sold throughout the State of New York and various other States in the United States.

That no process is used to separate the gas from the water but only so much gas is used as escapes naturally from the water, and no part of said gas is wasted or permitted to escape, but all of such gas is caught and used.

That said defendant is, and for a long time past has been, engaged in bottling, shipping and selling mineral water obtained from its said property for drinking purposes for use by invalids and others, and has sold and shipped the same throughout the United States of America, and has been engaged in building up and increasing the business of bottling such waters and selling all of such water for which there is any market or demand. That none of such water is wasted but so much thereof as is not bottled and sold is returned to the land from which it is obtained, and such water thereupon re-enters the land and again percolates therein.

That at no time has the defendant ever pumped from the wells upon its said property a quantity of water or gas, or both, that exceeded the natural flow from said wells, and at no time has the defendant ever accelerated or increased the flow or produced an unnatural flow of such water and gas from the wells on its property drilled into the rock for the purpose of extracting, compressing, liquifying or vending the gas separate from the water or other mineral ingredients with which it is associated.

That the defendant has not by any act done upon its property, or by the said pumping, or the use of any artificial appliances, caused any damage whatsoever to the natural mineral springs in the Village of Saratoga Springs, or to any other well or spring in the vicinity thereof.

That the business of compressing carbonic acid gas was first commenced in the Village of Saratoga Springs about the year 1888 by one Julius Z. Formel, and he was followed by the Geysers Natural Gas Company in the year 1892, by the Lincoln Spring Company about the year 1894, and the New York Carbonic Acid Gas Company in 1895. That all said Companies and the said Formel found it impossible to reach the water and gas and acquire possession of same without the use

of pumps or other artificial appliances, and the pumping of such mineral water for the purpose of extracting, collecting, compressing, liquifying or vending such gas as a commodity otherwise than in connection with the mineral water and other mineral ingredients with which it was associated, either by the use of pumps or other artificial appliances and processes, has been going on continuously from the dates aforesaid.

That the defendant has not since the enactment of the statute, Chapter 429 of the Laws of 1908 of the State of New York, pumped any greater quantity than it did in the years it was conducting similar operations in its said business in Saratoga Springs prior to the passage of said act, and, as deponent is informed and believes none of the other Gas Companies above mentioned has since the enactment of said statute been pumping any greater quantity of water and gas than it did prior to the passage of said Statute, and, as deponent is informed and believes, said operations have been of about a uniform magnitude since their commencement.

That the business of the defendant Natural Carbonic Gas Company is distinctly a summer business, the gas sold by it being used mostly for charging soda water and the like, although large quantities are also used in hospitals and in the operation of railroad block signals.

That most of said defendant's business is done by long term contracts under which the defendant has contracted to sell and deliver large quantities of gas approximating nearly its total output, and if defendant is not permitted to operate its usual business it will mean an absolute loss of \$400. per day, and in addition it will suffer great and irreparable injury in loss of trade and in being liable for damages for breaches of its contracts, and it will be forced into abandoning the large cash investment made in its business under the faith and credit of its charter granted by the State of New York, and it will suffer irreparable damage and injury.

That said property of the defendant, in which its bondholders and stockholders have invested upwards of \$500,000, is not suitable for, and cannot be used, for any other purpose, and if the defendant is not permitted to use the same for the operation of its said business as heretofore said property will not be worth one-fiftieth of its present value, and the stockholders and bondholders of said Company will suffer an absolute loss in their investments amounting to over \$500,000.

That the defendant employs in its business about 60 persons, all

of whom will be thrown out of employment if it be not permitted to continue its said business.

That no loss or injury of any kind can result to the other defendants herein if they be enjoined and stayed from enforcing the provisions and prohibitions of said Statute against the Appellant and the defendant Natural Carbonic Gas Company until such time as the appeal herein may be heard and determined by this Court.

CLARENCE E. REID.

Sworn to before me this 29th }  
day of June, 1909. }

(SEAL)

KATHARINE M. AHRENS,  
Notary Public (No. 12),  
Kings Co., N. Y.  
Certificate filed in New York Co.

---

UNITED STATES SUPREME COURT.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY, JAMES D.  
McNULTY and others,  
Appellees.

STATE OF NEW YORK, }  
County of New York, } ss. :

WILLIAM R. HILL, being duly sworn, deposes and says: That he is a hydraulic engineer, and has been actively engaged in the practice of his profession for about thirty-five years, and maintains an office in the City of Albany, State of New York.

That he has been engaged in many important public works and as consulting engineer, and has acquired special knowledge of the

conditions governing the water supply of many different sections of the United States and of the State of New York.

That in the course of his experience he acted as Engineer in charge of the construction of the Syracuse Water Works, at Syracuse, State of New York, and as Special Deputy State Engineer in charge of the construction of the ship canal through the State of New York, and in many other large and important matters of like character.

That he has made a special study of the Village of Saratoga Springs and the surrounding territory and of the various springs therein situate, and has made an inspection of the wells upon the property of the Natural Carbonic Gas Company and is familiar with the conditions there existing, and has made observations and is familiar with the conditions affecting the various springs and wells in Saratoga Springs and its immediate vicinity. That he has examined the pumps and other apparatus used by the Natural Carbonic Gas Company and saw said pumps in actual operation and carefully examined the same, and from his special knowledge of pumps and pumping apparatus is entirely familiar with the effect and result obtained by the operation of said pumps. That said pumps when operated do not create a vacuum, do not create a suction and do not exercise any pervasive force on the waters and gases contained in the ground, but their effect is only to lift to the surface such waters as flow into the wells from a higher level. That the effect is similar in all respects to the dipping of a bucket into a well and drawing the water out by such means.

That deponent, in the course of his examination and investigation of the conditions affecting the supply of water and gas under the property of the Natural Carbonic Gas Company and in adjoining and surrounding property, and of the source and flow of such waters and gas, and of the effect of pumping thereon, caused to be made many scientific tests and experiments with respect thereto, as a result of which deponent affirms that the pumping of mineral water and gas from the wells made by boring or drilling into the rock from the premises of the Natural Carbonic Gas Company in Saratoga Springs does not, and cannot, accelerate the natural flow or produce an unnatural flow of the waters or gas therefrom, and does not, and cannot, have any effect whatsoever on the flow of water or gas in any other wells or springs in the Village of Saratoga Springs, and does not impede, retard, divert or diminish the natural flow

from any other mineral spring or well, or impair the quality of its waters or diminish the quantity of its carbonic acid gas or other mineral ingredients.

That the movement of the mineral water through the rock is very slow and consists of percolation or seepage only, there being no well defined channel or water courses in the rock through which the water flows, the water merely percolating through tiny crevices and pores in the rock.

That the water producing strata of rock is very dense, the water therein being about one-quarter of one per cent. of the entire bulk, as a result of which the movement of the water as it seeps or oozes through the underground rock is so slow that it would take years for the water in the vicinity of the springs in the Village to reach the property of the Natural Carbonic Gas Company, if the movement of the water was that way.

That the property of the Natural Carbonic Gas Company is about three-quarters of a mile to the south of the springs of the Village of Saratoga Springs, and the movement of the underground waters passing the property of the Natural Carbonic Gas Company is from a northwesterly direction and consequently in no event does the water obtained by the Natural Carbonic Gas Company pass or approach the springs of Saratoga Springs.

That no injury can result to any springs or wells of Saratoga Springs, or the owners thereof, from the operation by the Natural Carbonic Gas Company of its property and the pumping of mineral water and gas from the wells thereon.

WILLIAM R. HILL.

Sworn to before me this 30th )  
day of June, 1909. }

KATHARINE M. AHRENS,  
Notary Public (No. 12),

(SEAL.)

Kings Co.,  
N. Y.

Certificate filed in New York Co.



## UNITED STATES SUPREME COURT.

STUART LINDSLEY,

Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY, JAMES D.  
 McNULTY and others,  
 Appellees.

STATE OF NEW YORK, }  
 County of New York, } ss. :

EDLOW W. HARRISON, being duly sworn, deposes and says : That he is a hydraulic engineer and has been actively engaged in the practice of his profession since about the year 1872, and that he has been engaged in many important public works and as consulting engineer acquired special knowledge of the conditions governing the water supply of many different sections of the United States, and has in the course of his experience made a special study of the conditions affecting the water supply in the northeastern section of the State of New York.

That he has made a special study of the Village of Saratoga Springs and surrounding territory from actual observation, from an inspection of various springs, from official surveys, from an inspection of the wells upon the property of the Natural Carbonic Gas Company, and from many tests made in respect to the wells and the flow of water and gas therein upon the property of the Natural Carbonic Gas Company, and he is familiar with the conditions there existing, and has made observations and is familiar with the conditions affecting the springs in the Village of Saratoga Springs proper, to the North of the Village, on South Broadway, and to the South of the Village. That he has examined the pumps and other apparatus used by the Natural Carbonic Gas Company and saw said pumps in actual operation and carefully examined the same, and from his special knowledge of pumps and pumping apparatus is entirely familiar with the effect and result obtained by the operation of said pumps. That said pumps when operated do not create a vacuum, do not create a suction, do not

exercise any pervasive force on the waters and gases contained in the ground, but their effect is only to lift to the surface such waters as flow into the well from a higher level. That the effect is similar in all respects to the dipping of a bucket into the well and drawing the water out by such means. That by actual experiment it is shown that these pumps do not create sufficient suction to hold a piece of paper to the end of the pipe which is connected with the well.

That by the use of such pumps and apparatus it is impossible to draw the water or to in any wise interfere with the natural flow of the same.

That the supply of water and gas is not limited. The mineral water is continuously being renewed by the rain-fall on the outcrop of rock from and through which it percolates down and through to the property of the Natural Carbonic Gas Company and the surrounding territory, meeting with and taking up the gas which is continuously being formed in the rock.

The rock formation from which the mineral water and gas is obtained under the property of the Gas Company is very dense and the interference of any draft created by pumping can be felt in a very limited area only, the greatest draft noted in actual tests upon such property not exceeding over 100 and 150 feet from each well, and such draft not affecting other wells on the same property.

That the movement of water and gas through the rock is very slow and due to percolation induced by gas pressure, and no amount of pull caused by such pumping would affect the flow of the water.

That there are no well defined channels or water courses in the rock through which the water flows, but the water is percolating only, and the effect of a draft created by pumping is only to remove obstacles in the tiny crevices and pores of the rock through which the water percolates, and to create a difference of pressure.

That the area influenced by the draft created by such pumping is a body surrounded on all sides by a surface which is equidistant from the foot of the well or inlet to such well. That the movement of the water through the rock is so slow, as shown by actual experiment, on draft that the time of the flow of the water between Saratoga Springs, where the so-called natural springs are situated, and the Natural Carbonic Gas Company property, if the flow of the water was that way, would be measured by many years.

That the formation of the rock is such that the pumping of one well does not affect the other wells or interfere with the supply of water therein.

That an example of the non-interference with adjacent wells is shown by the continuous spouting of the Carlsbad Spring whether the nearby wells are being pumped or standing without being operated.

Another example of this kind is the Adams Spring, which has a continuous natural flow notwithstanding that it is surrounded by wells which are being continuously pumped.

That from the foregoing and from all the facts and circumstances which have come to deponent's knowledge and under his observation, and as a result of the actual tests made and experiments and investigations had with respect to the supply of mineral water and gas, its source and flow, and with respect to the operations of the Natural Carbonic Gas Company and the other Gas Companies and spring owners in Saratoga Springs and the surrounding territory deponent affirms that the operations conducted by the said Natural Carbonic Gas Company upon its property and the use of its pumps and other apparatus thereon for the securing of the mineral water and gas does not affect the flow of water in the wells of any adjoining land owner, does not affect the supply thereof, does not affect the flow of water in any other spring or well in Saratoga Springs, nor impede, retard, diminish or divert the flow of water or gas therein, or impair the quality thereof, or the quantity of the mineral ingredient, and that such operations do not cause any injury to any spring owners, property owners, or any other persons in the Village of Saratoga Springs or elsewhere.

That the amount of water and gas taken by the Natural Carbonic Gas Company from its property is inconsiderable compared to the practically inexhaustible supply. That if such water was not intercepted and taken by said Gas Company no benefit would result to any other property owner in Saratoga Springs, or its vicinity. Such water if not intercepted would eventually in the course of its percolations find its way into the trough forming the Valley of the Hudson River.

EDLOW W. HARRISON.

Sworn to before me this 30th }  
day of June, 1909. }

KATHARINE M. AHRENS,  
Notary Public (No. 12),

(SEAL)

Kings Co., N. Y.,

Certificate filed in New York Co.

U. S. Supreme Court,  
FILED.

SEP 21 1909

JAMES H. McKENN

No. 260

---

---

Supreme Court of the United States.

---

STUART LINDSLEY

vs.

NATURAL CARBONIC GAS COMPANY.

---

---

OPINION OF JUSTICE PECKHAM UPON  
APPELLANT'S APPLICATION FOR  
RESTRAINING ORDER.

---

---

RENDERED, JULY 19, 1909.

---

---

C. C. Robinson, 32 to 34 Spring Street, New York.

Supreme Court of the United States.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
ET AL.,  
Appellees.

The Appellants have made application to me for an order in the nature of an injunction order to stay all proceedings of Appellees toward the enforcement of an act of the Legislature of New York in regard to the pumping etc. of mineral waters and the gas contained therewith in the Saratoga lands section and in the complainant's bill of complaint. The complainants commenced their suit in the Circuit Court of the United States for the Southern District of New York for the purpose of having the statute mentioned declared unconstitutional as a violation of the Federal Constitution. The complainant moved for an order founded upon the bill and affidavits to restrain the enforcement of the act pending the litigation. This motion was denied, the Court holding the unconstitutionality of the act was not sufficiently plain to warrant an injunction before trial. Subsequently one Frank H. Hathorn and Emily H. Hathorn commenced an action in the Supreme Court of the State of New York to enjoin the appellants herein from accelerating or increasing by means of pumps etc. the flow of water from the deep wells dug by the appellant on its own land in the Town of Saratoga, which, as plaintiffs Hathorn alleged in the complaint, effected the flow of the water from the

springs owned by the plaintiffs, and either destroyed them or diminished the flow therefrom. An injunction was granted *pendente lite* by the Court, as prayed for, which upon appeal from the order granting it, was affirmed upon appeal, both by the Appellate Division and by the Court of Appeals of the State. By virtue of this injunction the proceedings of the complainant herein would be entirely stayed and no pumping could be done. After the granting of this injunction by the State Court the Federal Circuit Court sustained demurrers which had been interposed by the defendants in the suit now before me and the bill of complainants was dismissed. The complaint charged that the act violated the Federal Constitution and because of that allegation an appeal was allowed direct to the Federal Supreme Court and the case is now in that Court. I am asked to stay all proceedings on the part of Hathorn and also of the Attorney General of the State until a hearing can be had upon the appeal taken to the Federal Supreme Court and a decision made thereon by that Court. Assuming that by the prior commencement of this suit to prevent the enforcement of the act the Federal Court obtained jurisdiction of the subject matter thereof so that upon appeal to the Supreme Court of the United States, I, as one of the Associate Justices thereof would have jurisdiction to stay proceedings in a State Court in an action subsequently commenced and also to stay proceedings of the State Attorney General towards enforcing the act the question arises whether I ought under the circumstances to grant such an order. An application in the Circuit Court has been made for an injunction, which as I have said was refused by the Judge on the ground that the case was not plain enough to warrant its being granted before trial. The demurrer to the bill of complaint has been allowed, the Court thus holding that the complainant has no case against defendants founded upon the alleged unconstitutionality of the act in question. Turning to the record in the State Court in the Hathorn case I find that the highest Court of the State has pronounced the act as to the third sub-division valid and therefore enforceable. As the question is one of an alleged violation of the federal constitution the judgment of the New York Court of Appeals is not final, although entitled to most respectful consideration upon that point. In such a case as this I ought to hesitate long

before staying all proceedings to enforce an act of the Legislature of a State. If it were a case of a money judgment or one where the damages arising from a stay (which the Supreme Court might hold ought not to have been granted after hearing the appeal on the merits) could be clearly and easily ascertained, it might be proper to grant the stay upon filing a bond to pay such damage. But the damages which might flow from such a stay, it is easily seen, are very uncertain, most difficult of ascertainment and subject to the vicissitudes of a probable long drawn out litigation, and which in the end might not afford full relief for the damage really sustained. It does seem under these facts the Appellees herein ought to be allowed the benefit of the decisions in their favor thus far, aided as they are, by the presumption in favor of the validity of the act. And in addition to the decision of the Court of Appeals upon the validity of the Act, that Court has plainly decided that the Hathorn complaint was well founded as an action at common law, and that it stated a good cause of action, or it made "out a case for relief under common law principles." A holding by the Court of Appeals that the plaintiffs were thus entitled to some relief separate from any consideration of the statute in question, might very possibly be regarded as conclusive upon the Federal Supreme Court upon that question, which would possibly be regarded as not a federal one. I feel that if it were fairly within the discretion of the Judge, I should like to aid the appellant in its progress towards a final decision, where if it succeeded it might have beyond all doubt the full benefit of that success, but I do not think I can give such aid under the facts of this case.

The motion for a stay of proceedings is denied.

Altamont, July 19, 1909.

R. W. PECKHAM,  
Asso. Jus. Sup. Ct. of U. S.





---

# Supreme Court of the United States

STUART L. LAMONT

1900

NATURAL GAS AND COAL

---

ADDITIONAL INFORMATION IN CONNECTION  
WITH THE ABOVE SUBJECT MATTER  
AND THE RESULTS OF THE  
INVESTIGATION THEREOF

---

REPORT OF THE

COMMISSIONER OF THE

GEOLOGICAL SURVEY

Supreme Court of the United States.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY and others,  
Appellees.

STATE OF OHIO, }  
County of Stark, } ss :

ALFRED G. HEGGEM being duly sworn deposes and says :  
That he is a mechanical engineer, graduate of Cornell University and a resident of Coraopolis, Pennsylvania, and that since his graduation from said University been actively engaged in the practice of his profession and had a great deal of experience in engineering in general and in particular with the construction and operation of wells and with the construction and operation of machinery for such wells, including water, oil and gas wells, and at present is mechanical engineer of the Oil Well Supply Company of Pittsburgh, Pa., a corporation engaged in the manufacture of machinery and supplies of all kinds for the supplying and operating of all kinds of wells.

That he has visited the plant and property of the Natural Carbonic Gas Company in the Village of Saratoga Springs, New York, and has thoroughly inspected the apparatus in use at said plant on said property for the pumping of mineral water and is thoroughly acquainted with the operation of the pumps therein used, and, with the apparatus there in use and operation it is absolutely impossible to create a

vacuum upon any of their wells, said Natural Carbonic Gas Company being able only to obtain what water naturally flows into the well and to the pump.

The said pumps do not in any wise act by the force of suction, but merely operate to lift the water from the well to the surface level, and that the operation thereof does not have the effect of acting by way of compulsion upon the water in the vicinity of said wells or to in any wise draw the water from any point.

The operation of these pumps is similar in effect to the lifting of water from the wells by a bucket or series of buckets attached to a rope; that if there was an insufficient supply of water in the wells to fill the barrel of the pump at any time the operation of the pumps would not have the effect of increasing the supply of water in such wells.

That in the use of these pumps in water containing an excess of carbonic acid gas it is impossible to obtain a flow equal to the figured capacity of the pumps on account of the excess of carbonic gas which prevents the pumps from lifting the full amount of water which its displacement if used in fresh water would require, a portion of this space being filled by the excess of carbonic gas:—in other words, the pumping of water containing an excess of carbonic gas is similar to the pumping of water of a temperature at or above the boiling point when steam is being given off.

ALFRED G. HEGGEM.

Sworn to before me this ninth }  
day of July, 1909, at Mas- }  
sillon, Stark County, State }  
of Ohio. }

JAMES PEACOCK,  
Notary Public within and for  
Stark County, Ohio.

Commission expires October 28th, 1911.

STATE OF OHIO, }  
 Stark County, } ss.

I, JACOB F. WISE, Clerk of the Court of Common Pleas, a Court of Law and Record of said County, do hereby certify that JAMES PEACOCK, before whom the annexed instrument was taken, was at its date a Notary Public in and for said County, duly authorized by the Laws of Ohio to take the same, and that I am well acquainted with his hand writing and that the signature thereto is genuine; and that the annexed instrument is executed and acknowledged according to the Laws of the State of Ohio.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Canton, this ninth day of July A. D. 1909.

JACOB J. WISE,  
 Clerk.

[SEAL]

IN THE SUPREME COURT OF THE UNITED STATES.

STUART LINDSLEY	}
vs.	
NATURAL CARBONIC GAS COMPANY,	
ET AL.	

SARATOGA COUNTY, ss :

EDGAR T. BRACKETT, being duly sworn, says that he is counsel for three companies engaged in the business of pumping mineral water in the town of Saratoga Springs, for the purpose of compressing and selling natural carbonic acid gas, separate from the water, situated similarly with the defendant Natural Carbonic Gas Company, one of the defendants above named: that the defendants whom deponent thus represents, under his directions, had exhaustive experiments and examin-

ations made, by experts of the highest character, who have given their conclusions to his said client as he is informed and believes.

That deponent is unable to secure the affidavits of said experts in time for the motion noticed herein for July 13th, 1909, said experts having been informed that said cases would not be tried before fall, and being out of the State, as deponent is informed and believes.

But deponent says, from the information that has been reported to him as to said tests, that said defendants are prepared to demonstrate, as he believes beyond all question, that the pumping operations carried on by his said clients, do not, in the slightest degree affect the wells of any other persons, and that the amount pumped by them severally, is no more than the one thus pumping is entitled to take and use, and is well within the volume of mineral water naturally coming upon the premises of the person thus pumping.

Deponent further says, that in his opinion, most important questions of law are involved in this action and in the actions in which deponent represents said companies before mentioned, questions of law that involve the constitutionality of the act under which it is sought to stop said companies from pumping, under the provisions of the Constitution of the United States.

EDGAR T. BRACKETT.

Sworn to before me this 12th }  
day of July, 1909. }

HIRAM C. TODD,

Notary Public.

[SEAL]

## SUPREME COURT OF THE UNITED STATES.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY and others,  
Appellees.

STATE OF NEW YORK, }  
County of Saratoga. } ss :

ROBERT McNAUGHTON, being duly sworn deposes and says : I reside in the Village of Saratoga Springs, New York, and for upwards of fifteen years have been actively engaged in the business of operating natural gas and mineral water springs in the Village of Saratoga Springs, New York. I have been engaged with the Wilcox Harvey Company, its successor, The Lincoln Spring Company, and the Natural Carbonic Gas Company, and have had the supervision of the various wells of those Companies during that period of time. I was also for a period of three months engaged with the Champion Spring, one of Mr. Julius Z. Formell's properties, located southwest of the Village line at what is known as "The Geysers."

The Lincoln Spring Company's property in Saratoga upon which are sunk its mineral water wells, are situated on the westerly side of South Broadway, about one mile from the Village of Saratoga proper, and are joined on the north by the property of the Natural Carbonic Gas Company.

While engaged at the Lincoln Spring, I had every opportunity to make a careful study of the wells of that Company, and became entirely familiar with their construction and operation, and since leaving the Lincoln Spring, have had the daily care of the wells of the Natural Carbonic Gas Company, and



had such wells under my supervision and careful and continuous observation, and am very familiar with their condition, their history, their operation and their care.

There are fourteen of such wells made by boring or drilling into the rock, all of which are different as to depth, as to the number of mineral water veins that they tap, and as to the quality of the mineral water, as to their quantity of gas, as to their water levels, and as to their casing, tubing and sealing. It has been my constant care to see that these wells did not deteriorate, that they were cleaned out when necessary, and that they were re-tubed and re-sealed, as the occasion demanded.

From the above characteristics and conditions of these separate wells, I have had every opportunity to acquire an expert knowledge of the subject of mineral water and gas wells, and from the variety of causes of interference with the natural flow of these wells, have encountered, in the care of them, nearly every condition that arises to deteriorate the quality of mineral water or the diminution of the supply of carbonic gas.

I have carefully watched the effect of withdrawing the mineral water from these wells, and am familiar with the natural flow of such wells and of the causes that have arisen to prevent the further use of specific wells at certain times.

Some of the wells are known as dry gas wells, there being no mineral water in the bores of such wells. Of the mineral water wells only two are at present not in use, one of them for the reason that at the time it was first tubed the well became plugged up by the breaking of seals and of the pipe. This well was never used, for that reason, and mineral water, or gas, has never been taken from it. The other mineral water well which is not in use at present contains a seal which was lost in the bore while retubing, and until this seal can be withdrawn, and the well properly tubed, no use can be made of it. On the premises of the Gas Company, however, there has never been a well containing mineral water and carbonic gas which became exhausted. None of these wells was ever pumped out, nor did the operation of a pump in any well ever exhaust the mineral water and carbonic gas in any other well on the premises.

That these wells are all fitted with tubing, seals and

lift pumps, by means of which the water naturally flowing into the bottom of the well is lifted to the surface. That such lift pumps do not suck the water or gas from the ground or exercise any persuasive force thereon or exercise any force or compulsion upon waters in the lands of the Gas Company or in or under adjoining lands. That such pumps, tubing and seals, or any thereof, do not cause any acceleration of the water in the wells or in the lands of the Gas Company, nor do they increase the flow or cause any unnatural flow thereof. That the acts of the Gas Company in the operations of its said property, and of its pumps and other artificial appliances, do not cause any damage whatsoever to any springs upon Hathorn's premises, or to any other springs in the vicinity, and do not impede, retard, diminish, divert or endanger the natural flow of any mineral springs in and about the Village of Saratoga Springs or any mineral springs owned by said Hathorns, and do not impair the quality of the waters thereof and do not diminish the quantity of carbonic acid gas and mineral ingredients therein.

That the pumps used by the Gas Company are the common deep well pumps, by which the water is raised through a series of valves. That the difference between a deep well pump and a shallow well pump operated with the same force and rapidity is that the supply obtained by a deep well pump is less than that obtained by a shallow well pump, for the reason that the deeper down the water and the greater the distance to the surface, the heavier the column of water to be raised, and the greater the length of time required to bring the water to the surface.

That the Gas Company has never at any time pumped more than the natural flow of such wells, nor accelerated or increased the flow or produced an unnatural flow thereof. That the depth of the bores of these wells, at which the mineral water is found, varies between 161 feet and 294 feet, the average depth being 222 feet. The water levels of these various wells vary as much as 30 feet, and are from 100 to 127 feet below the ground.

That the geological strata at the point where these wells are driven runs about as follows: 55 feet of soil and gray sand, 40 feet of quick sand, 20 feet of clay formation, 15 feet dark gray sand and gravel, 40 to 115 feet of slate, 40 to 70 feet

of limestone. That the water flows into the wells from the slate and lime stone rock.

That the well now being operated upon the premises of Frank H. Hathorn in the Village of Saratoga Springs is bored through rock to a depth of about 1000 feet but is sealed off at 475 feet and 500 feet so that only water between these two seals can enter the bore of the well. That the geological formation down to and including said seals, as deponent is informed and believes, is 62 feet of drift, 203 feet of lime stone, of the Trenton group, porous strata, and 230 feet of lime stone, Birds-eye and Black River formation.

That there is a difference between the ground levels of the Hathorn property and the Gas Company's property, the Gas Company's property being about 45 feet higher than the Hathorn property. In addition the top of the Hathorn tubing is 6 feet below his ground level, so that there is a difference of 51 feet in elevation between the top of Hathorn's tube and the top of the Gas Company's tubes.

That the Gas Company's water is drawn from an average depth of 222 feet from the top of its tube, and the Hathorn water from a depth of 475 feet from the top of their tube, a difference of 252 feet, which added to the 51 feet difference in ground level shows that the water of the Hathorns comes from a strata 306 feet lower than the water flowing into the Gas Company's wells.

That by reason of the foregoing it is absolutely impossible for the Gas Company to affect the flow of water in the Hathorn well by such pumping, for in order to affect the water supplying the Hathorn spring it would be necessary for the Gas Company by the use of its pumps to draw the water up hill through the rock, using sufficient force to overcome friction, resistance and the downward flow of the water, thereby accomplishing an engineering impossibility.

That after the water is lifted from the wells by the pumps, the gas escaping therefrom is caught and compressed and liquified and sold. So much of the water as is necessary to supply the trade is bottled and sold, and any water that remains is then returned to the ground from which it was taken and re-enters and again percolates therein.

That the Gas Company has never at any time extracted any unreasonable quantity of water or gas from its said

premises, and at all times the amount taken has been less than the natural flow. That the amount taken from all the wells averages an aggregate of about 120 gallons per minute.

That the supply of water and gas has not diminished in recent years, and there is as much water and gas as ever, and there is no danger of the supply thereof becoming exhausted or the quality impaired, or of the quantity of carbonic acid gas or other mineral ingredients being diminished.

That the springs or wells of the Saratoga Section are divided practically in three sections—The first comprising those located in the village proper including the Hathorn, Congress and others; the second—about three quarters of a mile to the South of the Hathorn Spring and between the Village and the Geysers and in which second section are located the wells of the Natural Carbonic Gas Company and the Lincoln Spring Co.; the third—at the Geysers, about a mile and a half to the South of the properties of the Natural Carbonic Gas Company and the Lincoln Spring Company.

That in the Geysers Section will be found the Adams and the Carlsbad Springs both of which flow naturally and steadily to the surface of the ground notwithstanding that they are surrounded and adjacent by and to the wells of the New York Carbonic Acid Gas Co. and the Geysers Natural Gas Company which are being pumped continuously. That such pumping does not injure or diminish the flow of said Natural Springs the Adams and Carlsbad thereby showing that there is no intercommunication between the various wells and springs.

That in the second section it has been demonstrated by exhaustive scientific tests that pumping by the Natural Carbonic Gas Company does not affect the flow or the quantity of water or gas in the wells of the adjoining property of the Lincoln Spring Co. although not more than two or three hundred feet intervene between the wells of the respective Companies.

That similar tests have demonstrated that there is no connection between the wells of the Natural and Lincoln Companies and the wells in the Village proper or with the wells in the Geyser Section.

That from the exhaustive tests made as well as from a careful and continuous observation and study of the water

and the flow thereof and of the conditions affecting the same, deponent affirms that the water has no well defined underground channels or water courses but simply seeps or oozes through the rock and that the underground movement of the water (there being no underground flow) is so slow that the period of time that it would take for such water to move from the Natural Carbonic Gas Co. property to the Hathorn property or to the spring properties at the Geysers or *vice versa* would be measured by years.

That in deponent's opinion the water is constantly being replenished by the rainfall at some distant point upon the out crop of the rock formations from whence it slowly seeps and oozes down through the rock to and under the property of the Natural Carbonic Gas Company. That the supply of carbonic acid gas is also being constantly replenished and is not beoming exhausted.

That the amount of water taken from all the springs and wells in Saratoga Springs and its vicinity in an area of about fifteen square miles is less than 500,000 gallons per day, and is less than the amount of the average daily rainfall for that vicinity on one square mile of land after allowing for evaporation and run off.

That if the water was not intercepted by the Natural Carbonic Gas Company it would be lost, as it would gradually move down and find its way into the trough forming the Valley of the Hudson.

That no loss or injury of any kind can result to the other defendants herein, or to any spring owners, or other persons in Saratoga Springs if the Appellees herein be stayed and enjoined from enforcing the provisions and prohibitions of said statute against the Appellant and the Natural Carbonic Gas Company until such time as the appeal herein may be heard and determined by this Court.

That the State of New York does not own any property or mineral springs or wells, or any mineral water or gas producing property in Saratoga Springs, or the immediate vicinity, and owns no interest of any kind in any such properties therein, and no injury can result to the People of the State of New York if the Natural Carbonic Gas Company be permitted to continue its said operations.

I have read the affidavit of Clarence E. Reid herein, veri-

fied the 29th day of June, 1909, and know the contents of same, and the statements therein made and contained as to the damages that will result to the Natural Carbonic Gas Company from an enforcement of said statute pending an appeal herein, and the irreparable loss and injury that the Natural Carbonic Gas Company will thereby suffer are in all things true and correct.

That the mineral waters produced by the various wells of the Natural Carbonic Gas Company and others in the Village of Saratoga Springs and at the Geysers all differ radically as to quality and as to the quantity of their mineral ingredients and to such an extent as to be plainly noticeable to the taste.

That the Natural Carbonic Gas Company maintains upon its premises a pavilion from which it dispenses free to the public four different mineral waters which are produced from four different wells upon its property. That thousands of visitors at Saratoga Springs and others, visit such pavilion and drink of the waters and take them away with them, and said Natural Carbonic Gas Company has at all times been, and still is able to supply all of the mineral water desired by the public, and for which there is any demand.

ROBERT McNAUGHTON.

Sworn to before me this 9th }  
day of July, 1909.

(SEAL) B. H. SEARING,  
Notary Public,  
Saratoga Springs, N. Y.

## SUPREME COURT OF THE UNITED STATES.

---

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY and others,  
Appellees.

---

STATE OF NEW YORK, }  
County of New York, } ss :

GUTHRIE B. PLANTE being duly sworn deposes and says :  
That he is a member of the firm of Morris & Plante, solicitors  
for the Appellant herein, and has made a previous affidavit  
herein under date of June 30th, 1909.

That he is familiar with all questions involved in this  
action and with all the facts relating to the enactment of  
Chapter 429 of the Laws of 1908 of the State of New York,  
and the subsequent litigation brought by the Appellees to  
secure the enforcement thereof.

That, as he is informed and believes, none of the Appellees,  
other than Frank H. Hathorn, owns any spring or well, pro-  
ducing mineral water or carbonic acid gas, in Saratoga Springs  
or its vicinity, nor has any interest in any such spring or well.

That deponent knows of no complaints or charges by any  
spring owner in Saratoga other than said Hathorn that the  
pumping of the Natural Carbonic Gas Company or other  
Companies has injured his spring or impaired the flow thereof.

That the said Natural Carbonic Gas Company commenced  
its operations in Saratoga in the Fall of 1905, taking over the  
going business of a New Jersey corporation of the same name,  
which last named corporation had at that time been pumping  
mineral water and gas for over two years.

That in or about the year 1905 said Hathorn commenced



an action in the Supreme Court of the State of New York seeking to restrain Dr. Strong's Sanitarium from pumping its wells upon its property about 600 feet to the east of the Hathorn Spring, claiming that the operation of such pump had destroyed the Hathorn wells.

That on the trial of that action Hathorn and his witnesses testified that pumping to the east of the Strong property had an immediate injurious effect upon the Hathorn wells, while pumping to the south (which had been going on for over ten years by the other Companies) had no noticeable effect upon his springs, while in the present litigation Hathorn has sworn that his spring is being ruined by the pumping of the Natural Carbonic Gas Company to the south.

That in 1907 Mr. Justice SPENCER granted a permanent injunction restraining the defendant from pumping, his decision being reported, *Hathorn vs. Strong*, 55 Misc. (N. Y.) 445.

That, as affiant is informed and believes, in the past few months said Hathorn has bottled and shipped to the trade many thousands of bottles of mineral water taken from the wells upon his property, is continuing such bottling, shipping and selling of mineral water, and is able to supply all the requirements of his trade.

That in July, 1908, a temporary injunction was obtained restraining the Natural Carbonic Gas Company from operating its wells, and for a period of a few days the Company was compelled to cease operations, but during such suspension of pumping no change was noticed in the Hathorn well or the other wells surrounding it.

That in August, 1908, injunctions were obtained restraining pumping at the Patterson spring situated 130 feet to the north of the Hathorn, the Putnam Spring situate 280 feet to the north of the Hathorn, the Congress Spring situate 500 feet to the south of the Hathorn, and the Natural Carbonic Gas Company and the Lincoln Spring Company and the New York Carbonic Acid Gas Company and the Geysers Natural Gas Company situate to the south in a direct line with the Hathorn and Congress Springs, and the nearest of which is 4600 feet from the Hathorn. Observations were made daily of the depth of the water in the Strong, Putnam, Patterson, three of the Hathorn, Congress No. 3 and No. 9, and the Ainsworth, the average of the measurements show-

ing that the water rose in the Strong  $2\frac{1}{8}$  inches, in the Putnam  $2\frac{3}{4}$  inches, in the Patterson  $4\frac{1}{2}$  inches, in the three Hathorn  $2\frac{3}{4}$  inches,  $1\frac{1}{4}$  inches and 1 inch, while in the Congress No. 9 it fell 1 inch and in Congress No. 3 it fell  $1\frac{1}{8}$  inches, and in the Ainsworth there was no change. The rising of the water in the Hathorn Spring was due to the effect of the suspension of pumping from the Putnam and Patterson Springs. If any effect would be due to the stoppage of pumps at wells of the Natural Carbonic Gas Company it would have caused the water to rise in the springs nearest to them, that is, in Congress No. 3 and No. 9, but in these springs the water fell, so it is apparent that it could not affect the Hathorn Springs as they are located still further north beyond the Congress and Ainsworth Springs.

That the fact of a connection between the Patterson, Putnam, Ainsworth and Hathorn Springs is shown as follows: In the year 1888 Seymour Ainsworth failing to secure sufficient water from his wells dynamited the bores at a depth of 600 feet, shattering the rock and causing the water to cease to flow into the Hathorn and other springs immediately adjacent. Thereafter these Ainsworth bores were plugged up and the water brought back to the Hathorn wells by the use of a powerful pump. That episode, however, marked the commencement of the troubles of the Hathorn Spring, and Hathorn's own testimony and admissions in various litigations are all to the effect that for years the water at times would cease to flow and could only be brought back by the use of a pump.

The action brought in the State Court in the name of the People is brought by the Attorney General at the instigation of the other Appellees through the same attorneys, and complaint therein reading word for word with the complaint in the action brought by Frank H. Hathorn, and while brought in the name of the People it is practically on the relation of Hathorn and for his benefit.

That in the aforesaid action brought in the name of the People the Appellees by their attorneys have used every effort to obtain temporary injunctions against the defendant Gas Company, and, as deponent is informed and believes, said Appellees were intending to, and, unless restrained by this

Court, will immediately apply to the Special Term of the Supreme Court of the State of New York for an injunction *pendente lite*, which, if granted, must necessarily be without security.

That if the Appellees had so desired, a trial of either or both of said State Court actions could have been had prior to this time, but, as deponent verily believes, said Appellees made no effort to secure a trial of same, and in fact caused such trial to be delayed.

That, as deponent verily believes, said action in the name of the People is brought for the sole purpose of harassing and annoying the Natural Carbonic Gas Company, and for the purpose of securing an injunction *pendente lite*, restraining it without security from conducting and continuing its said business.

GUTHRIE B. PLANTE.

Sworn to before me this 12th }  
day of July, 1909.

KATHARINE M. AHRENS,  
Notary Public (No. 12),

[SEAL.]

Kings Co.,

N. Y.

Certificate filed in New York Co.



No. 260

U.S. Supreme Court, D.  
FILED.  
SEP 21 1900  
JAMES H. MCKENNE

# Supreme Court of the United States.

STUART LINDSLEY,

*against*

*Appellants,*

NATURAL CARBONIC GAS COMPANY,

JAMES D. McNULTY AND OTHERS,

*Appellees.*

No. 544.

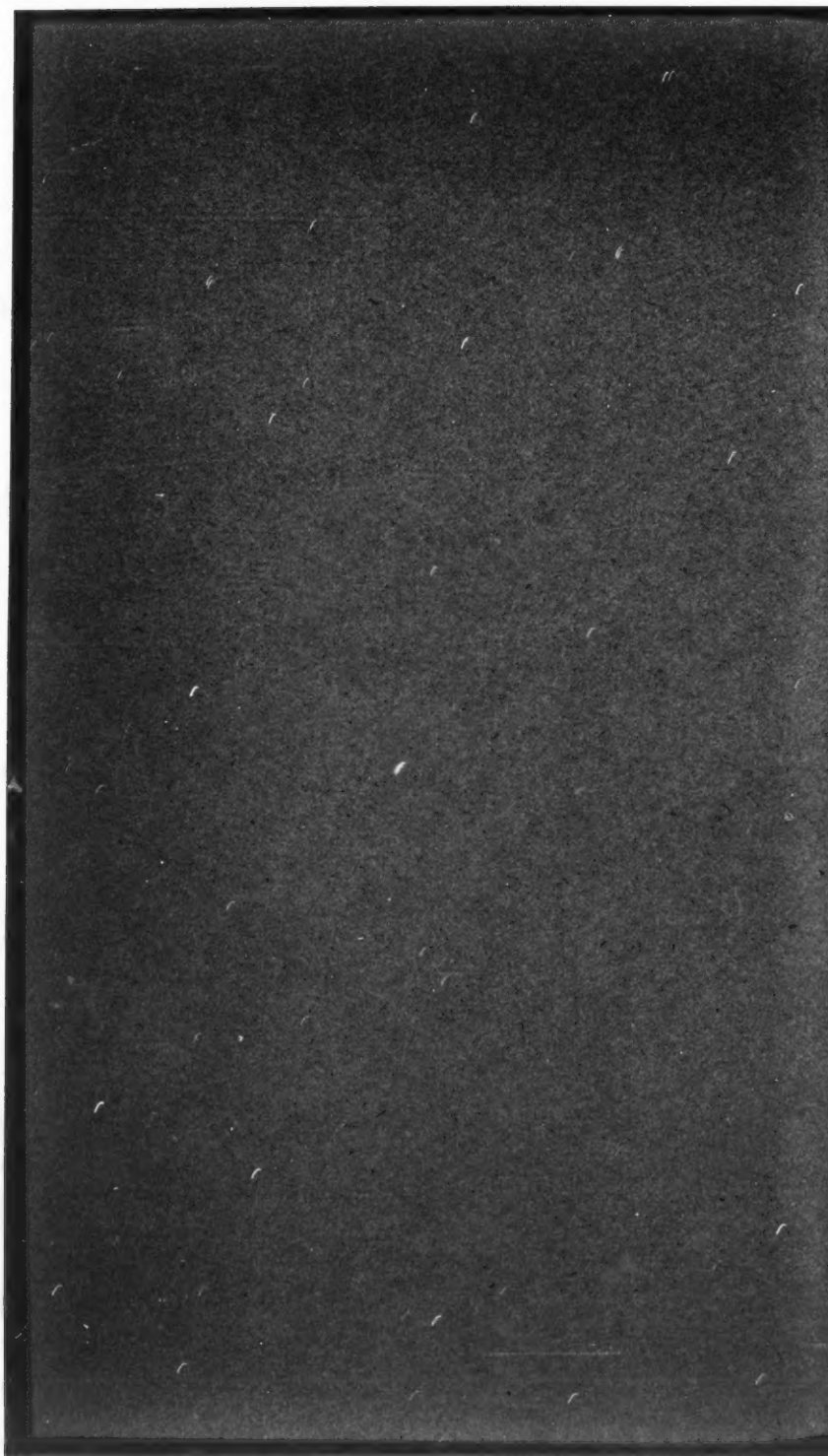
OCTOBER, 1900, TERM.

## MOTION TO ADVANCE.

ALTON B. PARKER,

ROBERT C. MORRIS,

*Of Counsel for Appellants.*



# Supreme Court of the United States.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY ;  
WILLIAM S. JACKSON, as Attorney-  
General of the State of New  
York ; JAMES D. McNULTY, WILL-  
IAM E. WOOLLEY, GEORGE A. FARN-  
HAM, WILLIAM D. ELLIS, JAMES  
M. ANDREWS, WILLARD LESTER,  
CHARLES C. VAN DEUSEN, D. PETER  
MCQUEEN, SPENCER TRASK, HENRY  
S. CLEMENT, CORNELIUS SHEEHAN,  
ISRAEL PUTNAM, JOHN DON, JAMES  
H. BAKER, EDWARD W. KEARNEY,  
JULIUS H. CARYL, HARRY CROCKER,  
WILLIAM B. GAGE, WILLIAM B.  
HEUSTIS, DOUGLASS W. MABEE,  
WINSOR B. FRENCH, CHARLES D.  
THURBER, BENJAMIN J. GOLDSMITH  
and WILLIAM M. HOES, individu-  
ally and as members of the Citi-  
zens' Committee in charge of the  
Movement to Restore the Sara-  
toga Mineral Springs and the  
Prestige of Saratoga Springs as  
a National Health Resort ; and  
FRANK H. HATHORN.

Appellees.

No. 514.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

## **Motion to Advance Appeal and for Restraining Order.**

The appellant above named respectfully moves to advance  
this cause, and to set the same for argument at the earliest date  
convenient to the Court.



The appellant also respectfully asks that pending the hearing and determination of this appeal the defendants and appellees above named other than the Gas Company be stayed, and enjoined from enforcing in anywise the provisions and prohibitions of the Statute hereinafter mentioned against the Natural Carbonic Gas Co. and that said Company may during such time be stayed and enjoined from complying therewith.

The matter involved briefly stated is as follows: By a statute of 1908 the State of New York prohibited the pumping of mineral water holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock and prohibiting the use of artificial appliances in such wells;

FIRST: When the result of such pumping or operation is to accelerate the flow or produce an unnatural flow of the water or gas;

SECOND: When the result of such pumping or operation is to lessen or impede the flow from any other spring or diminish or impair the quality or quantity of the carbonic acid gas or other mineral ingredients;

THIRD: When such pumping or operation is for the purpose of extracting the gas and vending it separate from the water; and

FOURTH: Prohibiting the doing of any act or thing whatsoever whereby the natural flow from any such well or spring is impeded or diminished or the quantity of gas diminished or the quality thereof impaired. (Laws of New York, 1908 Chap. 429).

The statute declares the doing of any of the prohibited acts unlawful and provides that any person violating the statute may be enjoined at the suit of the Attorney-General or of a taxpayer.

The appellant brought this cause in the Circuit Court, filing his bill on behalf of himself and all other bond and stockholders of the defendant Natural Carbonic Gas Company, a corporation organized and existing under the laws of the State of New York owning land in the Village of Saratoga Springs from which it was extracting mineral water and gas for the purpose of vending the water and gas separately. The Bill charges that the defendant Attorney General of the State of New York and the other defendants, spring owners

and members of a Saratoga Citizen Committee were threatening and attempting to enforce the provisions of said statute against the defendant Gas Company; that the statute in question is violative of Sec. 1 of Art. XIV. of the Constitution of the United States and unconstitutional and void as taking property without due process of law and without compensation and denying to the complainant and defendant Gas Company the equal protection of the law.

At the commencement of the action application was made at Circuit for a preliminary injunction, which was refused, Mr. Justice WARD, by whom the matter was decided, placing such refusal practically upon the grounds that the statute was not so clearly unconstitutional as to permit him to grant the injunction.

See *Lindsley vs. Natural Carbonic Gas Company*,  
162 Fed. 954.

The defendants demurred to the amended bill filed, but prior to the hearing before the Circuit Court upon the demurrers, the Court of Appeals of the State of New York in *Hathorn vs. Natural Carbonic Gas Company*, 194 N. Y., 326, had considered and passed upon the statute here involved holding the first, second and fourth provisions to be unconstitutional, and the third constitutional.

The learned judge at Circuit in considering the constitutionality of the statute followed *Hathorn vs. Natural Carbonic Gas Co.* (*supra*) and sustained the demurrers and granted a final decree dismissing the bill.

The appellant contends that at common law a land-owner has a property right in the water and gas percolating under and through his land and cannot be restrained from acquiring them. It is submitted that as the statute deprives the land-owner of his right to pump and acquire the water it takes his property contrary to the inhibitions of the Fourteenth Amendment to the Constitution and is therefore void in all its provisions, it being contended by appellant that the so-called "third" provision of the statute is equally as broad as the other three that were rejected by the New York Court of Appeals and therefore equally bad.

It can therefore be seen by the Court that the case raises a fundamental question of the greatest importance which has never been directly passed upon by this Court.

A number of cases are pending under the statute against various gas companies and spring owners of Saratoga Springs the result of which will affect property to the value of upwards of a million dollars. Since this suit was commenced two cases have been brought against the Natural Carbonic Gas Company based upon the statute in one of which a temporary injunction has been granted by the New York Supreme Court restraining the Gas Company from doing such acts as are condemned by the statute.

There are also six other separate actions brought by the People of the State of New York against The New York Carbonic Acid Gas Company, The Geysers Natural Gas Company, the Lincoln Spring Company, the Congress Spring Company, Mary A. Patterson and Harry M. Levenson. All such cases were likewise commenced by the Appellees after the commencement of this cause.

The decision of this Court upon this appeal will control the final determination of all such actions. Some of these cases have been noticed by the People for trial at an extraordinary term of the Supreme Court appointed by the Governor of the State of New York to be held at Albany on September 20th. This but demonstrates the importance to those interested of securing an early decision upon this appeal and of maintaining intact the present status of these matters insofar as the Court may deem proper. Should any or all of the above mentioned actions now pending in the State Court, and noticed for trial on September 20th, 1909, be actually tried and determined the needs of the various defendants would be but the greater for relief from this Court, because it is obvious that upon any such trials in the State Courts, as a result of the decision of the Court of Appeals in the Hathorn case, the statute will be held to be constitutional and valid and enforced accordingly.

The property of the Gas Company in which there has been invested by complainant and other stock and bond holders, over half a million dollars is thereby threatened with destruction, its business will be dissipated and ruined and complainant and others similarly situated will suffer irreparable injury.

The property, plant and appliances owned and operated by the defendant company in its gas and water business are not suitable for and cannot be used in any other business and will

become of little value if the company be not permitted to continue its present operations. Most of its business is covered with long term contracts with its customers so that if its business be stopped it will be forced to default on its contracts and be subjected to upwards of a thousand claims and suits for damages which would wipe out what little could be saved from the wreck of its plant. The stock and bonds would thus be rendered valueless and the holders would lose their entire investments.

When the defendant company was granted its charter by the State of New York with power to carry on this particular business, the acts now prohibited by chap. 429, Laws of 1908, were entirely lawful and not actionable at common law according to the rules laid down by the Courts of England and by the Courts of the various states of the United States.

In the Hathorn case the New York Court of Appeals has applied a new rule to the rights of property owners in underground percolating waters, the application of which by means of the enforcement of the statute will mean the destruction of the defendant company and irreparable injury to appellant.

The appellees contend that the statute is penal in its operation and effect and that each act committed in violation thereof being declared unlawful is punishable under the provision of the New York Code by imprisonment for one year or a fine of \$500. or both. The defendant company is therefore threatened with a multiplicity of criminal prosecutions with resulting fines, the aggregate of which would soon ruin the company, and its officers and servants are threatened with imprisonment.

If the other defendants and appellees are permitted to enforce the provisions and prohibitions of said statute against the defendant company prior to the hearing of the appeal herein by this Court the business of the Company will be destroyed, its property will be rendered worthless and complainant's investment therein in bonds and stock will likewise become worthless and of no value and said Company and complainant and all other stockholders and bondholders similarly situated will suffer irreparable loss and injury and if this Court should hold said statute to be unconstitutional and reverse the decree of the Circuit Court, such reversal and the decree of this Court thereon would be rendered ineffectual by the

threatened acts of the said defendants. The purpose of such decree of this Court would be thus defeated and appellant would obtain no relief therefrom.

In addition the various other Gas Companies mentioned will be subjected to similar prosecutions, their businesses ruined, their employees deprived of employment, and the investors in their securities subjected to irreparable loss and injury.

On the 2nd day of July, 1909, Appellants secured from Mr. Justice PECKHAM an order requiring the Appellees to show cause before him at Altamont on July 13th, 1909, why an order should not be made enjoining them from enforcing the provisions of said statute until the hearing and determination of the appeal herein by this Court. Such application was subsequently heard before Mr. Justice PECKHAM at Altamont on the 13th day of July, 1909, and thereafter a decision was rendered by him denying such application.

The application made to Mr. Justice PECKHAM on July 2nd, 1909, was for an order to show cause before the Court at the opening of the October Term why the proceedings aforesaid of the Appellees should not be stayed until the determination of the appeal and why the appeal should not be advanced for argument, with a stay of proceedings in the meantime. Mr. Justice PECKHAM declined, however, to grant such a temporary stay without a hearing, and therefore the proceedings resulted as aforesaid. The question of advancing the appeal for argument was not presented to or considered by Mr. Justice PECKHAM.

The affidavits and papers upon which such application was made to Mr. Justice PECKHAM, together with his opinion thereon, have been lodged with the Clerk of the Court, and reference is hereby made thereto for all intents and purposes, same being submitted together with the record herein in support hereof.

The argument of this appeal it is believed will be brief and will occupy much less than the time usually allowed by the court.

Appellant therefore respectfully prays this Court to advance this cause for argument so that the validity of said statute as tested under the provisions of Sec. 1, Art. XIV., of the

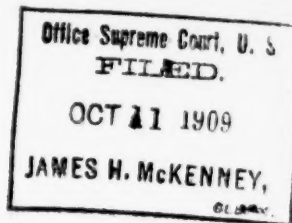
Constitution of the United States may be finally determined by this Court before complainant's property is entirely destroyed, and that pending the hearing and determination thereof of this Court that the defendants and appellees aforesaid may be stayed and enjoined from prosecuting and enforcing against said Natural Carbonic Gas. Co. and complainant the provisions and prohibitions of said statute.

Dated September 13th, 1909.

ALTON B. PARKER,  
ROBERT C. MORRIS,  
of Counsel for Appellant.







Supreme Court of the United States.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY and others,  
Appellees.

No. ~~100~~ 260

**MEMORANDUM FOR APPELLANT ON MOTION TO ADVANCE AND FOR RESTRAINING ORDER PENDING THE DETERMINATION OF THE APPEAL.**

This cause was commenced in the Circuit Court of the Southern District of New York for the purpose of having Chapter 429 of the Laws of 1908 of the State of New York declared unconstitutional and of having the appellees restrained from enforcing the provisions of said statute against the said gas company, and the gas company restrained from obeying the same.

The facts shown by the amended bill briefly are :

That the company is the owner of certain lands in the Village of Saratoga Springs, from which are obtained mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, which water and gas do not exist in any underground reservoir, have no

well-defined underground courses or channels, but are percolating waters only.

That such waters do not flow to or upon the surface of the ground, but can only be reached and acquired and brought to the surface for use by the use of pumps and other artificial appliances.

That the company is engaged in the business of extracting such waters, compressing and vending the gas separate from the water as well as bottling and selling the water.

That for the purpose of carrying on such business an expensive plant equipped with costly and valuable machinery has been erected by the company upon such property representing an investment by appellant and other bondholders and stockholders of the company of upwards of a half million dollars.

That the Statute in question prohibits the pumping of water and gas and the acquiring of the same by artificial appliances where the object of such acquisition is to market the gas separate from the water as well as by sundry other provisions (since declared by the New York Court of Appeals to be unconstitutional) prohibiting absolutely the pumping of any such water and gas.

That the defendants were threatening and attempting to enforce the Statute against the company; that the Statute is violative of Sec. 1 of Art. XIV. of the Constitution of the United States, and unconstitutional and void as taking property without due process of law and without compensation and denying to the complainant and defendant company the equal protection of the law.

Upon the case coming on to be heard upon demurrers to the amended bill, a final decree was entered dismissing the amended bill, from which decree an appeal has been perfected to this Court.

An examination of the record shows that the questions presented for the consideration of this Court involve the application of Sec. 1 of Art. XIV. of the Constitution of the United States.

After the commencement of this cause by the filing and service of the bill, the appellees (defendants at Circuit) commenced and caused to be commenced in the State Courts of New York, actions and proceedings for the purpose of enforce-

ing the provisions of said statute against said Natural Carbonic Gas Co. and against appellant. In such actions they applied for and obtained temporary injunctions restraining the Gas Company from continuing its business operations. Also since the filing of this motion they have obtained permanent injunctions against the Natural Carbonic Gas Co. and four other gas companies without proof of any injury by the companies to any spring or person, the State Court holding that as a result of the Statute in question, pumping for the purpose of selling the gas separate from the water was injurious, as a matter of law, and that proof of injury or absence of injury was immaterial.

This Court having regularly acquired jurisdiction of the subject matter of the action and of the parties, the appellant now asks that the appeal be advanced for argument and that pending the hearing and determination of the appeal the appellees be stayed and enjoined from enforcing the provisions of the statute against the appellant and the Gas Company, upon the ground, among others, that the actions being prosecuted by them in the State Courts will destroy the business and the property of the Company and cause it and appellant irreparable loss and injury and thus render ineffectual the decree of this Court should it be in favor of the appellant, it being clearly shown that no loss or injury of any kind can result in the meantime to the appellees if such relief be granted.

### **POINT I.**

**The motion to advance upon the facts shown should be granted.**

We will not enter upon any extended argument of this branch of the motion as we are informed that counsel for the appellees will not oppose the advancement of the appeal for argument if the Court deems it proper under the circumstances shown.

Large interests are involved and the matter is of importance to thousands of citizens of the State of New York. Four

corporations in Saratoga Springs alone, whose investments in this natural gas industry, aggregate upwards of a million dollars are on the verge of being completely ruined and destroyed unless immediate relief can be had, with absolutely no redress or recoupment if this Court shall subsequently declare Chapter 429 of Laws of 1908 of the State of New York to be unconstitutional and void.

The Statute is being enforced without proof of injury to any natural spring or well or to any individual; without proof of any connection between springs; or that there is any common reservoir or source of supply; or that the companies waste any gas or water; or that the quantity of gas or water pumped from the wells is greater than the natural flow thereof; or that in any way such pumping has diverted, impeded, retarded or diminished the flow of water or gas under adjoining lands or any other lands in Saratoga Springs or impaired the quality of the water or diminished the quantity of the mineral ingredients or impaired the quality thereof. In fact without proof that there are any natural springs in Saratoga Springs or its immediate vicinity producing water and gas of the character mentioned in the statute.

While it may seem remarkable that the Gas Company could be enjoined under the statute without proof of all or at least some of the above matters, yet the fact remains that it has been enjoined with several others without any proof thereon.

Such injunctions were granted by the New York Supreme Court at trials had at an Extraordinary Special Term held in Albany on September 20th and 21th, 1909. The judgment containing this injunction was granted upon the simple admission of the defendant's answer that it pumped the water and gas for the purpose of vending the gas separate from the water.

We call the attention of this Court in that connection to the proceeding had upon the trial of that action in the State Court and of the findings of the trial Court which are embodied respectively in "Appendix A" and "Appendix B" of this memorandum.

This emphasizes the need of the appellant for speedy relief, which can alone be secured by the advancement of the appeal or by imposing a restraint upon the appellee.

All that is urged under the next point in support of that branch of the motion which seeks a restraining order can be and is used in support of the application to advance.

## POINT II.

**The facts shown in the moving papers furnish sufficient grounds for the issuance of a restraining order against the appellees.**

The Appellant asks that the Appellees be restrained from enforcing the provisions of Chapter 429 of the Laws of 1908 of the State of New York, and from prosecuting certain State Court actions commenced after the filing and service of the bill herein until this Court shall have heard and determined this appeal, basing his request for relief upon the facts, as shown by the moving papers, that without such restraint the Appellant and the Appellee Natural Carbonic Gas Company will suffer irreparable loss and injury, while on the other hand no injury will result to the other appellees during the period of such restraint.

It is unnecessary to discuss in detail the injuries that the appellant and the Natural Carbonic Gas Company and the other bondholders similarly situated with appellant, will suffer if the other appellees named be permitted to continue to enforce said statute and to prosecute the State Court actions specified in the moving papers. The particulars of these matters, as well as a full statement of the nature and extent of the company's business, the operation thereof and the loss and injury that must necessarily result from a cessation of such business operations, even though but for a short period, are fully set forth and cannot be denied.

In fact the Court can very readily see from an examination of the moving papers that it is this very precarious situation that exists as regards the gas company's business that has apparently led the appellees to harass, annoy and injure the company by their State Court proceedings, endeavoring to ruin and destroy the company's business by temporary in-

junctions and restraining orders, and thus attempting to put the company out of business in advance of trial so that no matter what the final outcome of the case may be, whether for or against the company, its legitimate operations, harmless to others, will have entirely ceased with no hope of their being revived because of the business ruin of the company.

There can be no doubt that if the appellees named are permitted to proceed as they have been doing, and are threatening to do, that the result will be as stated, and that any decree subsequently made by this Court declaring the statute in question unconstitutional will be ineffectual to afford any relief to the appellant, or to the other bondholders similarly situated, for and in whose behalf this action is also brought. A decision, then, by this Court upholding the right of the company to operate its property will contain little equity for appellant and the others interested, and the very object and spirit of the Constitution will be defeated and its provisions will afford no protection to the citizens whose property is being taken.

The only question in the case therefore as to which the slightest contention can be made is, as to whether the appellees named will suffer injury as the result of the granting of such restraining order, or from the operations of the defendant company.

The counsel for the appellees will strenuously contend that the defendant company, with other gas companies in Saratoga, is ruining the natural springs of the village, depleting the natural resources of the State, impairing the quality of the mineral water, and ruining the owners thereof, and that the companies are in fact a menace to the peace and prosperity of the Village. This, of course, forms a basis for a most eloquent appeal to the sympathies of the Court, but has no foundation in fact and slight support in any affidavits or papers that have ever been produced in connection with this litigation.

To support the application the appellant presents the affidavits of Edlow W. Harrison and William R. Hill, expert hydraulic engineers enjoying wide and enviable reputations in their profession; affidavits of Clarence E. Reid and Robert McNaughton, respectively Vice-President and Manager and the Superintendent of the defendant Gas Company; the affi-

davit of Alfred G. Heggem, an expert mechanical engineer familiar with the practical operation of pumps and apparatus of the character in use by the defendant, and familiar with the effects thereof; and affidavits by other engineers and owners of mineral water producing properties in Saratoga and others. All such affiants are unanimous in positively asserting that the operations of the Gas Company can have no ill effect upon any other spring or well in the Village of Saratoga Springs or the vicinity thereof, and can cause no injury of any kind to such wells or springs or interfere with the flow of the water therein.

The affidavits of all these persons are based upon exhaustive scientific tests made within the last few months upon the various mineral water producing properties in Saratoga.

The result of these tests and of the observations and inspection of the various springs and of the study of the conditions affecting them, and the supply of water and gas thereof and of the sources and flow of such water and gas and of the effect of pumping thereon, as set forth in such affidavits, may be briefly summed up and said to establish beyond peradventure of a doubt the following facts:

1. That the mineral water has no well defined underground water courses, but is percolating water that seeps and oozes through the rock.
2. That the pumps now in use and being operated by the Gas Company do not create a vacuum, do not create a suction, and do not exercise any pervasive force on the waters and gases contained in the ground, but their effect is only to lift to the surface such waters as flow into the wells by the laws of nature.
3. That the Gas Company pumps from all its wells an aggregate of about 120 gallons per minute, which is less than the natural flow thereof.
4. That the total amount of water pumped and taken from the wells and springs in Saratoga and vicinity in an area of about 15 square miles does not exceed 500,000 gallons per day, which is less than the average daily rainfall upon one square mile of land.
5. That the water producing strata of rock is very dense, the water therein being about one-fourth of one per cent. of the entire bulk, as a result of which the movement of the water as it seeps and oozes through the rock is so slow that

it would take years for the water in the vicinity of the Natural Carbonic Gas Company to reach the springs in the Village, or the springs at the Geysers, or *vice versa*.

6. That the property of the Natural Carbonic Gas Company is situated about three-quarters of a mile to the south of the springs of the Village of Saratoga Springs, and practically on a straight line between the Village and the Geysers, the springs at the Geysers being about a mile and a half to the south of the property of the Natural Carbonic Gas Company.

7. That there is no connection or intercommunication between the wells of the Natural Carbonic Gas Company and the wells in the Village section, or the wells of the Geysers section.

8. That there is no connection or intercommunication between the many wells on the property of the Natural Carbonic Gas Company and the wells on the adjoining property of the Lincoln Spring Company, which wells are not more than 200 or 300 feet apart.

9. That the water is constantly being replenished by the rain fall at some distant point upon the outcrop of the rock formation, from whence it seeps and oozes through the rock to and under the property of the Natural Carbonic Gas Company and others, and that the supply of gas is also being constantly replenished and the supply of both water and gas is practically inexhaustible.

10. That the various wells on the property of the Natural Carbonic Gas Company and in the Village of Saratoga Springs and in the Geysers section all differ as to their respective depths, water levels, quality of the water, extent of the flow, quantity of gas and differ in respect to the geological formation through which same are drilled.

11. That there are no wells or springs in Saratoga or in the vicinity thereof that flow to the surface of the ground without the use of tubes, seals, pumps and other artificial appliances, or some thereof, and that of all such wells and springs only two flow to the surface of the ground without the use of pumps, to wit : The Adams and the Carlsbad Springs.

12. That the State of New York owns no property, mineral water or gas producing or otherwise in Saratoga Springs or the vicinity thereof; owns no mineral springs or wells therein, and has no interest of any kind in any such properties therein,



and no injury can result to the People of the State of New York if the Natural Carbonic Gas Company be permitted to continue its said operations.

13. That no loss or injury of any kind can result to any of the appellees named, or to any spring owner or other persons in Saratoga Springs, if the appellees be stayed and enjoined from enforcing the provisions and prohibitions of said statute against the appellant and the Natural Carbonic Gas Company until such time as the appeal herein may be heard and determined by this Court.

No loss or injury to any person or damage to any spring has ever been demonstrated or proved in any action or proceeding by any of the appellees to have been the result of any of the operations of the Gas Company. In fact, the contrary has clearly appeared everywhere that the matter has been under investigation, and in all instances where the statute has been enforced such enforcement has been based upon a purely technical violation of the provisions of the statute.

See *Hathorn vs. Natural Carbonic Gas Company*, 60 Misc., 341, at 344-5,

where Mr. Justice HOUGHTON in granting an injunction said :

" I should not feel justified in granting a preliminary injunction (based on common law rights) especially where the springs are so widely separated, and direct proof of interference is so meagre."

Mr. Justice HOUGHTON then caused to be inserted in the order made by him granting the injunction the following provision :

" All of which said injuries to plaintiff are deemed by the Court to have been caused from a violation of Chapter 429 of the Laws of 1908, and the injunction is granted upon the sole ground that the defendant is guilty of a violation of the provisions of said statute."

In the action by the People against Natural Carbonic Gas Company, Mr. Justice FITTS in granting a similar injunction concurred in the finding of Mr. Justice HOUGHTON and caused

to be inserted in the order made by him a provision reading word for word with the above provision of the order made by Mr. Justice HOUGHTON.

The granting of a permanent injunction in the last-mentioned case and the proof upon which same was based we have discussed in the preceding point.

And again in *Hathorn vs. Natural Carbonic Gas Company* Mr. Justice SPENCER made an order finding the Gas Company in contempt for failure to obey the aforesaid order of Mr. Justice HOUGHTON in that it did not refrain from pumping for the purpose of extracting and selling the gas separate from the water, basing his finding upon a technical violation of the order, which enjoins in the language of the statute. Such finding of technical violation is evidenced by the amount of the fine, \$250 and costs, which is the statutory penalty imposed under Section 2284 of the Code of Civil Procedure of the State of New York as a penalty for a contempt where no actual loss or injury has been produced.

It is an interesting fact in connection with the situation at Saratoga Springs, that no spring owner other than Frank Hathorn, the appellee herein, has ever made any complaint that the Natural Carbonic Gas Company, or any other gas company in Saratoga, has caused any injury to his spring by its pumping, and that the enactment of the statute complained of, and its enforcement, and the prosecution of the State Court actions, and the persecution and harassing of the gas company with temporary injunctions and orders, has all been at the instigation and procurement of the said Hathorn.

About the time that the gas company commenced operating in the Village of Saratoga Springs Hathorn commenced an action against Strong's Sanitarium to restrain the operation of a pump about 600 feet to the eastward of the Hathorn spring, claiming that the operation of such pump has destroyed the Hathorn well.

On the trial of that action Hathorn and his witnesses testified that pumping to the east on the Strong property had an immediate injurious effect upon the Hathorn well, while pumping to the south which had been going on for years had no noticeable effect upon the spring.

In July, 1907, Mr. Justice SPENCER, before whom the action

was tried, granted an injunction restraining the defendant Strong from operating a suction pump upon his property.

See *Hathorn vs. Strong's Sanitarium*, 55 Misc., 445.

In that case the Court found that the Hathorn spring, discovered in 1868, had discharged large quantities of mineral water which had been used for medicinal purposes upon the premises or conserved in bottles and sold for use elsewhere, but that in recent years the quality of the gas had gradually depreciated and the flow of the water decreased so that at the time of the commencement of the action (1905) it had practically ceased to flow.

Notwithstanding the injunction obtained by Hathorn in that case no difference in the Hathorn spring was noted after the cessation of pumping by Strong to the east, and in the present litigation Hathorn has made affidavits to the effect that his spring is being ruined by the pumping of the defendant Gas Company to the South.

An absolute demonstration of the fact that pumping by the Natural Carbonic Gas Company does not affect the Hathorn spring or the springs in the immediate vicinity can be found in certain tests made in the summer of 1908. In July, 1908, a temporary injunction was obtained restraining the Natural Carbonic Gas Company from operating its wells, and for a period of a few days the company was compelled to cease operations, but during such suspension of pumping no change was noticed in the Hathorn well or the other wells surrounding it.

In August, 1908, injunctions were obtained restraining pumping at the Patterson Spring, situated 130 feet to the north of the Hathorn; the Putnam Spring, situated 250 feet to the north of the Hathorn; the Congress Spring, situated 500 feet to the south of the Hathorn, and the Natural Carbonic Gas Company and the Lincoln Spring Company, and the New York Carbonic Acid Gas Company and the Geysers Natural Gas Company, situated to the south in a direct line with the Hathorn and Congress Springs, the nearest of which companies is 4,600 feet from the Hathorn. Observations were made daily of the depth of the water in the Strong, Putnam, Patterson, three of the Hathorn, Congress No. 3 and No. 9, and

the Ainsworth, the average of the measurements showing that the water rose in the Strong  $2\frac{1}{2}$  inches, in the Putnam  $2\frac{3}{4}$  inches, in the Patterson  $4\frac{1}{2}$  inches, in the three Hathorn  $2\frac{3}{4}$  inches,  $1\frac{1}{2}$  inches and 1 inch, while in the Congress No. 9 it fell 1 inch and in Congress No. 3 it fell  $1\frac{1}{2}$  inches, and in the Ainsworth there was no change. The rising of the water in the Hathorn spring can be attributed to the effect of the suspension of pumping from the Putnam and Patterson Springs. If any effect would be due to the stoppage of pumps at wells of the Natural Carbonic Gas Company it would have caused the water to rise in the springs nearest to them, that is, in Congress No. 3 and No. 9, but in these springs the water fell, so it is apparent that it could not affect the Hathorn Springs as they are located still further north beyond the Congress and Ainsworth Springs.

The fact of a connection between the Patterson, Putnam Ainsworth and Hathorn Springs has always been accounted for as follows: In the year 1888 Seymour Ainsworth failing to secure sufficient water from his wells dynamited the bores at a depth of 600 feet, shattering the rock and causing the water to cease to flow into the Hathorn and other springs immediately adjacent. Thereafter these Ainsworth bores were plugged up and the water brought back to the Hathorn wells by the use of a powerful pump. That episode, however, marked the commencement of the troubles of the Hathorn Spring, and Hathorn's own testimony and admissions in various litigations are all to the effect that for years the water at times would cease to flow and could only be brought back by the use of a pump.

The statements of fact set forth above, which are absolutely supported by the papers submitted by appellant on this application, show that the defendant company was peaceably and quietly conducting its legitimate business enterprise, committing no acts of waste or vandalism, when its competitors in the spring water business, not so well equipped to compete by legitimate business methods in the production and sale of the particular commodity, secured the enactment of the statute in question, the only remaining provision of which affects only those situated similarly to the Gas Company by restraining the pumping of water where the purpose is to market and sell

the gas separate from the water, irrespective of any use that may be made of the water.

The absurdity of the situation is apparent if the Court stops to consider that one may pump as much as he pleases provided he sells only the water, letting the gas escape if he will, or provided he lets both the water and gas escape and waste, but that if he attempts to use the water and gas separately his acts will be immediately characterized as criminal and he subjected to injunction, fine and imprisonment. Surely the appellees should not be permitted to destroy an investment of upwards of half a million dollars until this Court has had an opportunity to consider and pass upon this remarkable product of modern legislation.

The statute makes the doing of any act in violation thereof unlawful, and the contention is made that the acts being declared unlawful become misdemeanors under the Penal Code of the State of New York, and punishable by fine of \$500 or a year in prison, or both. The defendant company, therefore, is placed in a position that prevents it from going on with its operations even though not commanded to stop by the State Courts in any of the pending actions, for its officers and employees refuse to take the risk of incurring punishment by fine and imprisonment.

Moreover, since the filing of this motion the appellees have caused to be served upon a large number of the employees of the Gas Company certified copies of the injunction granted in the action brought by the People, and have attempted to intimidate the employees with fear of arrest and punishment, and thus cause them to relinquish their employment to the manifest injury of the Company.

Such a situation alone affords ample grounds for the intervention of this Court.

See *ex parte* Young, 209 U. S., 123, at pp. 145, 146.

### POINT III.

#### **The power of the Court to grant the restraining order.**

Aside from the inherent powers flowing from the Constitution under which it was created, the power of the Supreme Court and of its justices to issue writs of the character herein prayed for, is set forth as follows in the Revised Statutes of the United States :

§ 716. "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

§ 719. "Writs of injunction may be granted by any Justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a Circuit Court where they might be granted by such Court. \* \* \*

§ 720. "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

By its express terms Section 716 gives the Court power to issue any writ necessary for the exercise of its respective jurisdiction, and has always been so construed.

See *Ex parte* the Milwaukee Railroad Co., 5 Wall. (U. S.), 188, at p. 190,  
where the Court said :

"The case being properly in this Court by appeal, we have, by the fourteenth section of the Judiciary Act, a right to issue any writ which may be necessary to render our appellate jurisdiction effectual."

Nor do the apparent prohibitions of Section 720 interfere with the exercise of this power by the Court or its Justices.

Julian vs. Central Trust Co., 193 U. S., 92-112, where the Court said :

" In such cases where the Federal Court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., restrain all proceedings in a State Court which would have the effect of defeating or impairing its jurisdiction. Sharon v. Terry, 36 Fed. 337, per Mr. Justice FIELD."

Sharon vs. Terry, 36 Fed. 337, at 365 :

" Notwithstanding the very general terms of the prohibition, with the single exception mentioned, it has been settled that it does not apply where the Federal Court has first obtained jurisdiction, or where, the State Court having first obtained jurisdiction, the case has been removed to the Federal Court. In such cases the Federal Court may restrain all proceedings in the State Court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction of the State Court has first attached. With its proceedings, then, no Federal Court can interfere by injunction."

See also

- Fisk vs. Railroad Co., 10 Blatchf., 520.
- French vs. Hay, 22 Wall. (U. S.), 250.
- Dietzsch vs. Huidekoper, 103 U. S., 494.
- President of Bowdoin College vs. Merritt, 59 Fed., 6.
- Iron Mountain R. Co. vs. City of Memphis, 96 Fed., 113.
- Central Trust vs. Western N. C. R. Co., 89 Fed., 24, Modf. 98 Fed., 489.
- Carner vs. Second National Bank, 67 Fed., 833.
- Mercantile Trust Co. vs. Roanoke, 109 Fed. Rep., 3.
- Fidelity Inc. Co. vs. Norfolk R. Co., 88 Fed., 820.
- Lindsley vs. Natural Carbonic Gas Co., 162 Fed. Rep., 954 at 957.
- Missouri K. & T. R. Co. vs. Scott, 13 Fed., 793.

Wagner vs. Drake, 31 Fed., 849.

Frishman vs. Insurance Co., 41 Fed., 449.

Terre Haute R. Co. *re*. Peoria R. Co., 82 Fed., 943.

High on Injunctions, Vol. 1, pp. 88-93.

The power of a Federal Court to grant injunctive relief restraining parties before it from prosecuting actions or proceedings in a state court which would interfere with its jurisdiction is fully demonstrated and sustained by Mr. Justice PECKHAM in an opinion in the recent case of

*Ex parte Young*, 209 U. S., 123.

#### POINT IV.

**The application is properly made to this Court in accordance with the prevailing practice.**

This case being in equity a supersedeas is ineffectual to secure to the appellant any relief.

Leonard vs. Ozark Land Co., 115 U. S., 465;

Hovey vs. McDonald, 109 U. S., 150,

where the Court, at page 159, said :

“ A supersedeas, properly so called, is a suspension of the Court below to issue an execution on the judgment or decree appealed from ; or, if a writ of execution has issued it is a prohibition emanating from the Court of Appeals against the execution of the writ.”

And again at page 160 :

“ But this case is not within the terms of the rule. There was no decree for a specific sum of money ; there was no decree at all in favor of the complainants ; and no execution was applicable to, or could be issued in, the case, except an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of



execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy."

Nor could any relief be obtained from the Circuit Court because the case is not within the provision of Equity Rule 93, which admits of the *modifying* or *suspending only* of an injunction by the Circuit Court Judge upon an appeal from the decree granting such injunction.

Equity Rule 93 was promulgated to prevent applications being made by an appellant to this Court for orders modifying or suspending, until the determination of the appeal, existing injunctions granted or continued by the decree appealed from.

Leonard vs. Ozark Land Co., 115 U. S., 465, at 468.

No injunction was ever granted in this case, nor does the decree appealed from grant, continue or dissolve any injunction but merely sustains the demurrers and dismisses the bill.

The case was not one, therefore, where an application could be made to the Circuit Judge allowing the appeal and before whom the case was argued, for an order continuing an injunction until the appeal should be determined because there was no injunction to continue.

The case comes distinctly within the ruling in

Murray vs. Overstoltz, 8 Fed., 110.

In that case a *quo warranto* proceeding praying ouster against Murray in the Supreme Court of Kansas having resulted in a judgment of ouster Murray sued out a writ of error to the *Supreme Court of the United States* and filed a bond which operated as a *supersedeas*. Notwithstanding the appeal and *supersedeas*, the plaintiffs in the State Court were proceeding to enforce the judgment of ouster by prosecutions and arrests, thus anticipating the judgment of the Supreme Court of the United States upon the writ of error.

Murray thereupon filed a bill in equity in the U. S. Circuit Court setting up the above facts and prayed for an injunction against such an enforcement pending the hearing and determination of the appeal. The Circuit Court (McCRARY, C. J.), in denying the relief sought said :

“ If the threatened proceedings on the part of respondents should be enjoined at all, it is because, if permitted, they would interfere with the power and right of the Supreme Court of the United States, by virtue of the writ of error, to take control of, and deal with, the entire subject matter of the litigation. Whether the Supreme Court has jurisdiction by virtue of the writ of error, and whether, if so, the threatened proceedings would interfere with its exercise, are questions for the Supreme Court to decide, and cannot be determined by a Judge of the Circuit Court.

“ The complainants have set out in their bill very fully the substance of the proceedings in the *quo warranto* case, and also the steps taken in order to obtain the writ of error and *supersedeas*, and counsel have argued before me at great length the question whether there was a federal question in the case, which involves, of course, the question whether the Supreme Court has jurisdiction thereof. It is not only clear that this is a question which might be decided by the Supreme Court, but also that it cannot be decided by any other Court. And, since the decision of this question must precede and in a large measure determine the question of the right of complainants to the injunction, I am clearly of opinion that the application must be addressed to the Supreme Court or to one of the Judges thereof. That Court is authorized to issue any writ which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law, Rev. St. § 716. If the effect of the threatened proceedings would be to interfere with the exercise of the jurisdiction of the Supreme Court in the *quo warranto* case, or to deprive the complainants of the full benefit of their writ of error and *supersedeas* bond, then the Supreme

Court can enjoin them, and a temporary injunction for that purpose can be granted by a judge of that Court.

" I know of no authority for the doctrine that the circuit court or the circuit judge, may interpose, by injunction, to prevent the execution of judgment of a state court upon the ground that it has been superseded by an appeal to the supreme court, or to enjoin state officials, or others from disregarding such supersedeas. In every such case an injunction is in aid of the jurisdiction of the supreme court.

" This is, therefore, a case in which an injunction might be granted by the supreme court, or a judge thereof, and not a case for the consideration of a circuit court or a circuit judge."

See

*Ex parte Milwaukee R. R. Co.*, 5. Wall. (U. S.), 188, where the Court issued a supersedeas to protect its jurisdiction and afford relief to the appellant.

In

*Kitchen vs. Randolph*, 93 U. S., 86, the practice of a Justice of the Supreme Court granting a stay upon appeal was upheld although the supersedeas was vacated upon motion because of the laches of the appellant in not taking the appeal or suing out a writ of error within sixty days after the rendition of the decree complained of.

In

*Birkett vs. Columbia Bank*, 195 U. S., 345, during the pendency of the appeal a supersedeas was granted by this Court for the relief of the appellant. No mention of this is contained, however, in the official report of the case cited above, but same is contained in the record on file.

Where the jurisdiction of the Court is appellate, as in this case, the Court has at all times recognized its power and the power of its justices to make any proper order to protect that jurisdiction and protect the rights of appellants pending the appeal and this Court has never shown any hesitancy in exercising that power to promote the ends of justice.

## POINT V.

### The Appeal is Properly Before This Court.

The action is in equity to have a certain law of the State of New York declared unconstitutional and void as violative of the Constitution of the United States and to have the defendants enjoined from enforcing its provisions.

Upon the defendants several demurrers to the bill a final decree was entered sustaining the demurrer and dismissing the bill. From such decree the appeal is taken direct to this Court.

Such an appeal is provided for and allowed by Act of March 3, 1891, Ch. 517, 26 Stat. L. 826, which provides Section 5 :

“ The appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases :

“ 1. \* \* \*

“ 2. \* \* \*

“ 3. \* \* \*

“ 4. In any case that involves the construction or application of the Constitution of the United States.

“ 5. \* \* \*

“ 6. In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

“ 7. \* \* \*.”

See Hastings, Atty. Gen., vs. Ames, 36 Fed. Rep., 726,

in which the Circuit Court of Appeals for the Eighth Circuit dismissed an appeal in a similar case upon the ground that the appeal should have been taken direct to the Supreme Court of the United States. Later an appeal in that case was taken to and decided by this Court being reported.

Smyth vs. Ames, 169 U. S., 466.

The decree entered upon the demurrers was final in form and effect. It dismissed the amended bill and left nothing

further to be done, the cause to all intents and purposes and as to all defendants being thereby finally disposed of.

Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S., 685.

That case is upon all fours with the case at bar as far as concerns the practice upon appeal and the right to appeal from a decree of dismissal entered upon demurrers.

There the action was commenced in the Circuit Court for the Western District of Texas. The bill filed attacked a Statute of the State of Texas and certain municipal ordinances of the City of Austin, claiming them to be in contravention of the Constitution of the United States. The defendants demurred to the bill and the Circuit Court sustained the demurrers and entered a decree dismissing the bill. The complainant then appealed from such decree direct to this Court. Upon the appeal coming on to be heard the appellees moved for a dismissal, but this Court held that the decree being final in form and effect and the case involving constitutional questions, the appeal was properly taken under Act of March 3, 1891, Ch. 517, 26 Stat., 826, and proceeded to decide the case upon the merits.

Also, Loeb vs. Columbia Township Trustees, 179 U. S., 472-476, 477,

which was an action brought in the Circuit Court for the Southern District of Ohio, involving the validity of a state statute under the Constitution of the United States. The petition was demurred to and sustained and from the judgment entered a writ of error (the action being at law) was obtained to this Court. Objection was made to the jurisdiction of this Court to proceed upon a writ of error directly to the Circuit Court, but this Court overruled the objection holding the judgment final, and the case within the provisions of the Act of March 3, 1891, Chap. 517-26, Stat. 826, and then proceeded to determine the appeal upon the merits incidentally reversing the judgment appealed from.

In

Beasley vs. Texas & Pacific Ry. Co., 191 U. S., 492, an appeal was taken to this Court from a decree of the Circuit Court of Appeals for the Fifth Circuit, dismissing a bill of

complaint upon demurrer for want of equity. A motion made to dismiss the appeal upon the ground that the decree was not final in form was denied, the Court saying, page 494 :

" There is a motion to dismiss the appeal to this Court on the ground that the decree was not final in form, but the decisions are the other way, and the case being one in which the decree of the Circuit Court of Appeals can be reviewed in this Court under the Act of March 3, 1891, we have jurisdiction, and the motion must be overruled."

The finality of a decree entered upon a demurrer depends entirely upon whether anything substantial remains to be done under it or whether the decree itself determines the litigation. If leave to amend be given, or the case be remanded from the Circuit Court of Appeals, with instructions to the lower court to take further action, no appeal can be taken therefrom to this Court ; but, on the other hand, if the bill be dismissed and nothing further remains to be done, an appeal to this Court will lie.

Bank of Rondout vs. Smith, 156 U. S., 330.

Clark vs. Kansas City, 172 U. S., 334.

Great W. Telegraph Co. vs. Burnham, 162 U. S., 339.

Hill vs. Chicago & Evanston R. Co., 140 U. S., 52.

Jones vs. Craig, 127 U. S., 213.

Elliott vs. Sackett, 108 U. S., 132-139.

Forgay vs. Conrad, 6 How. (47 U. S.), 201.

The fact that the decree dismisses the bill with costs to be taxed, without stating the amount of the costs, does not prevent the decree from being final in all respects. This precise point was passed upon and so held in

Fowler vs. Hamil, 139 U. S., 549.

Silsby vs. Foote, 20 How. (U. S.), 290-296-7.

## **POINT VI.**

**The facts stated in the amended bill are to be taken for all purposes of the action as true.**

No argument or citation of authorities is necessary to sustain the proposition that the several demurrers of the appellees admit the truth of all the facts alleged in the amended bill, not only upon the argument of such demurrers but upon this application. In fact the solicitors for the appellees so contended in the actions brought by them in the State courts, in which demurrers were interposed, and their contention was sustained by the Court of Appeals of the State of New York in

Hathorn vs. Gas Company, 194 N. Y., 326.

An examination of the amended bill herein will show that all the facts as to the operations of the defendant and the nature and extent thereof, and their effect upon the water under the company's land and under the lands of others; as to the investments made in its said business; as to the injury that will result from the enforcement of the statute; as to the acts and threats of the appellees and their intention to enforce said statute; and as to the other facts relative to the source and flow of the mineral water and gas, and the harmless operations of the company, are fully set forth in the bill, and consequently as fully admitted by the demurrers.

## **POINT VII.**

**The Application Should be Granted.**

Respectfully submitted,  
ALTON B. PARKER,  
ROBERT C. MORRIS,  
Counsel for Appellant.

## APPENDIX A.

### From the Minutes of the Trial.

#### SUPREME COURT,

#### ALBANY COUNTY.

<p>THE PEOPLE OF THE STATE OF NEW YORK</p>
--

AGAINST

<p>THE NATURAL CARBONIC GAS COMPANY.</p>
--

The issues in the above entitled action came on for trial at an Extraordinary Special Term of the Supreme Court held in the City Hall, in the City of Albany, N. Y., on Tuesday, September 21, 1909, before HON. WILLIAM S. ANDREWS, a Justice of this Court, without a jury, and the following proceedings were had :

**Appearances :**

For plaintiff: DANIEL E. BRONG, Dep. Atty. Gen.; ROCKWOOD, McKNIGHT & McKELVEY, by NASH ROCKWOOD and LAWRENCE B. McKELVEY; and CHARLES C. LESTER.

For defendant: MORRIS & PLANTE, by GUTHRIE B. B. PLANTE.

MR. PLANTE: I object to the trial of this action at this time on the ground the matters in dispute are already in the United States Circuit Court and another action is pending in that court which has taken jurisdiction of the subject-matter and has acted upon it and an appeal is pending in the United States Supreme Court which will in fact determine all the questions here in issue.



THE COURT : What do you mean, you have pleaded some other action in bar of this ?

MR. PLANTE : There was an action brought to restrain the enforcement of this statute and to have the statute declared unconstitutional and void. That court, as I have stated before, has taken jurisdiction of that action and has exclusive jurisdiction.

THE COURT : Has the court enjoined the prosecution of this action ?

MR. PLANTE : It has not.

THE COURT : Then I overrule the objection.

MR. PLANTE : Exception.

MR. PLANTE : I move to dismiss the Complaint on the ground that there is no cause of action stated under the statute, no cause of action stated for equitable relief and that Chapter 429 of the Laws of 1908 is unconstitutional and void.

THE COURT : The Complaint is practically the same as the Complaint of the other cases ?

MR. ROCKWOOD : The same.

THE COURT : The motion is denied and exception.

MR. BRONG : The plaintiff presents the pleadings and rests.

MR. PLANTE : I now move to dismiss the Complaint on the following grounds :

First, the plaintiff has failed to make out or prove a cause of action under Chapter 429 of the Laws of 1908.

Second, plaintiffs have failed to make out or prove a cause of action entitling them to equitable relief.

Third, plaintiffs have failed to make out or prove a cause of action entitling them to any relief at law.

Fourth, the plaintiffs have failed to prove the cause of action alleged in the Complaint.

Fifth, the statute, Chapter 429 of the Laws of 1908, is unconstitutional and void and violates Section 1 of Article 6 of the State Constitution and Section 1 of Article 14 of the United States Constitution in that it takes the property of the defendant without compensation and without due process of law, discriminates unlawfully between persons and property owners of one class and persons and property owners of another class as well as between persons and property owners of the same class and denies equal protection of the laws to the defendant.

Sixth, that it discriminates against certain localities.

Seventh, it provides for the taking of private property for private purposes.

THE COURT: I think I will deny the motion. As I said yesterday the ultimate result was the Court of Appeals had before them the question of the constitutionality of this particular provision of this particular statute. Whether it was constitutional or not depended upon the question as to whether it deprived any of these spring owners of any of their rights or property without compensation, if it did it was unconstitutional. Their rights consisted of the right to make a reasonable use of these underground waters and this underground gas. They had no property right in anything beyond that. If the use which they were making and which was prohibited by the statute was therefore unreasonable the statute was constitutional. It did not deprive them of any of their rights so far as that question of constitutionality was concerned. Now, the Court of Appeals held as a matter of law, as I understand their decision, that pumping gas from these wells for the purpose of liquefying it and selling it was an unreasonable use and the prohibition of that use did not infringe any property right, or right of any kind of the owner of those wells. That being so the State could prohibit. That being so probably, and this I do not have to go into, the gas beyond what was required for a reasonable use of it or a reasonable use of the water was the property of the state and any interference with its property the state had a right to prevent, and an attempt to prevent such an interference would not in any way be an infringement of the constitutional provision applying to each person the equal protection of the laws. That question would not be involved if the act was simply an act to protect the property of the state. It is probably also true that if that is so it would be an answer to your proposition that there is no equitable cause of action here stated. I think I will deny the motion.

MR. PLANTE: Exception. I presume from your Honor's ruling that way that there is no necessity of my attempting to prove facts which would tend to show that there is a discrimination and that the acts of the defendant are not an unreasonable exercise of their property rights, or not unreasonable or injurious to anybody and the statute therefore on that ground is unconstitutional. I would like to make a formal offer. I

offer to prove by witnesses present the existence at Saratoga and its immediate vicinity of wells which produce mineral water containing mineral salts and an excess of carbonic acid gas, which wells were drilled to but not into the rock, and offer to prove that the pumping of such wells as a matter of fact has the same effect upon the supply of water and gas as the pumping of wells bored into the rock.

MR. BRONG: I object to that.

THE COURT: Same ruling as before and an exception, and the offer may be made with the same force and effect as if witnesses were called and questions asked in the regular way and the usual objections, exceptions and rulings were taken, the grounds of the objection the same as in the other cases.

MR. PLANTE: I offer to prove as a matter of fact that no injury results to any other person from the pumping of the defendant.

MR. BRONG: Objected to upon the ground that it is immaterial, irrelevant and incompetent.

Objection sustained. Defendant excepted.

MR. PLANTE: I offer to prove as a matter of fact the provisions of Chapter 429 of the laws of 1908 are unconstitutional and void.

MR. BRONG: We object to it on the same grounds.

THE COURT: Same ruling.

MR. PLANTE: Exception.

MR. BRONG: I move for judgment and I now ask for final judgment.

THE COURT: Very well, you may submit your findings and requests in each of the cases.

## APPENDIX B.

### Defendant's Requests to Find and Ruling of Court Thereon.

SUPREME COURT,  
COUNTY OF ALBANY.

<p>THE PEOPLE OF THE STATE OF NEW YORK,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">AGAINST</p> <p>NATURAL CARBONIC GAS COMPANY, Defendant.</p>	}
---	---

The defendant requests the Court to find the following facts :—

I. That the defendant is, and has been since the 31st day of October, 1905, a domestic corporation. (Found.)

II. That the defendant is, and since said 31st day of October, 1905, has been, the owner of twenty-one acres of land in the Town of Saratoga Springs, Saratoga County, New York. (Found.)

III. That said land owned by defendant contains mineral water holding in solution natural mineral salts and an excess of natural carbonic acid gas. (Found.)

IV. That said mineral water holding in solution natural mineral salts and an excess of natural carbonic acid percolates in and through the defendant's said land. (Found.)

VI. That the defendant has sunk or drilled wells in and upon its lands, which wells are made by drilling or boring into the rock. (Found.)

VII. That said wells are fitted with tubing and seals and lift pumps, by means of which said mineral waters in or under the land and the gases therein contained are raised to the surface. (Found.)

IX. That it has not been shown that such pumps suck the gases or waters from the land or exercise any pervasive force therein, or exercise any force or compulsion upon waters in or under adjoining lands. (Found.)

XI. That it has not been shown that the said defendant in the operation of its property by pumping or otherwise in any way accelerated or increased the flow or caused an unnatural flow of the water or gas to the wells in or upon its said property. (Found.)

XIII. That it has not been shown that said defendant by pumping or the use of pumps or other artificial appliances has drawn or obtained or pumped any unreasonable quantity of said water or gas. (Refused.)

XV. That it has not been shown that the defendant has ever accelerated or increased the flow of such water or gas in or upon its property to the injury of the owners of any adjoining lands, or the injury of any other lands in the Village of Saratoga Springs, or elsewhere. (Found.)

XVII. That it has not been shown that the defendant by pumping, or otherwise, has diverted, destroyed, diminished, impeded or retarded the flow of such water or gas under the lands of any other person or corporation in the Village of Saratoga Springs or elsewhere. (Found.)

XIX. That it has not been shown that the amount of water or gas drawn and obtained or pumped by the said defendant from its said lands is more than the natural flow thereof. (Found.)

XXI. That it has not been shown that the defendant by such pumping has diverted, impeded, retarded or diminished the flow of such water or gas in or under adjoining lands, or under any other lands in Saratoga Springs, or caused the quality of such water to be impaired or the quantity of its mineral ingredients or gas diminished, or the quality thereof impaired. (Found.)

XXVI. That it has not been proved that the defendant wastes any of the water pumped by it from its said property. (Found.)

XXVII. That it has not been proved that the defendant wastes any of the gas obtained from the water pumped by it from its said property. (Found.)

XXIX. That it has not been shown or proved that there is any connection between the wells upon defendant's premises and any other mineral spring or springs upon adjoining or other premises. (Found.)

XXI. That it has not been shown or proved that the defendant's springs or wells are dependent upon the same source of supply as any other spring in the said Town of Saratoga Springs. (Found.)

XXXVII. That the plaintiffs do not own any well containing mineral water charged with an excess of carbonic acid gas. (Found.)

XXXIX. That it has not been shown or proved that in the Village of Saratoga Springs and its immediate vicinity there are any natural mineral springs containing or producing mineral water holding in solution natural mineral salts and an excess of carbonic acid gas with a natural flow to the surface of the ground. (Found.)

XLI. That it has not been shown or proved that the mineral water and gas obtained by the defendant is drawn or obtained from any common source or supply with that of any other spring or well in Saratoga Springs or its vicinity. (Found.)

Office Supreme Court, U. S.  
FILED.

OCT 7 1910

JAMES H. MCKENNEY,  
CLERK.

# Supreme Court

OF THE UNITED STATES.

STUART LINDSLEY,  
Appellant,  
against

NATURAL CARBONIC GAS  
COMPANY, JAMES D. Mc-  
NULTY and others,  
Appellees.

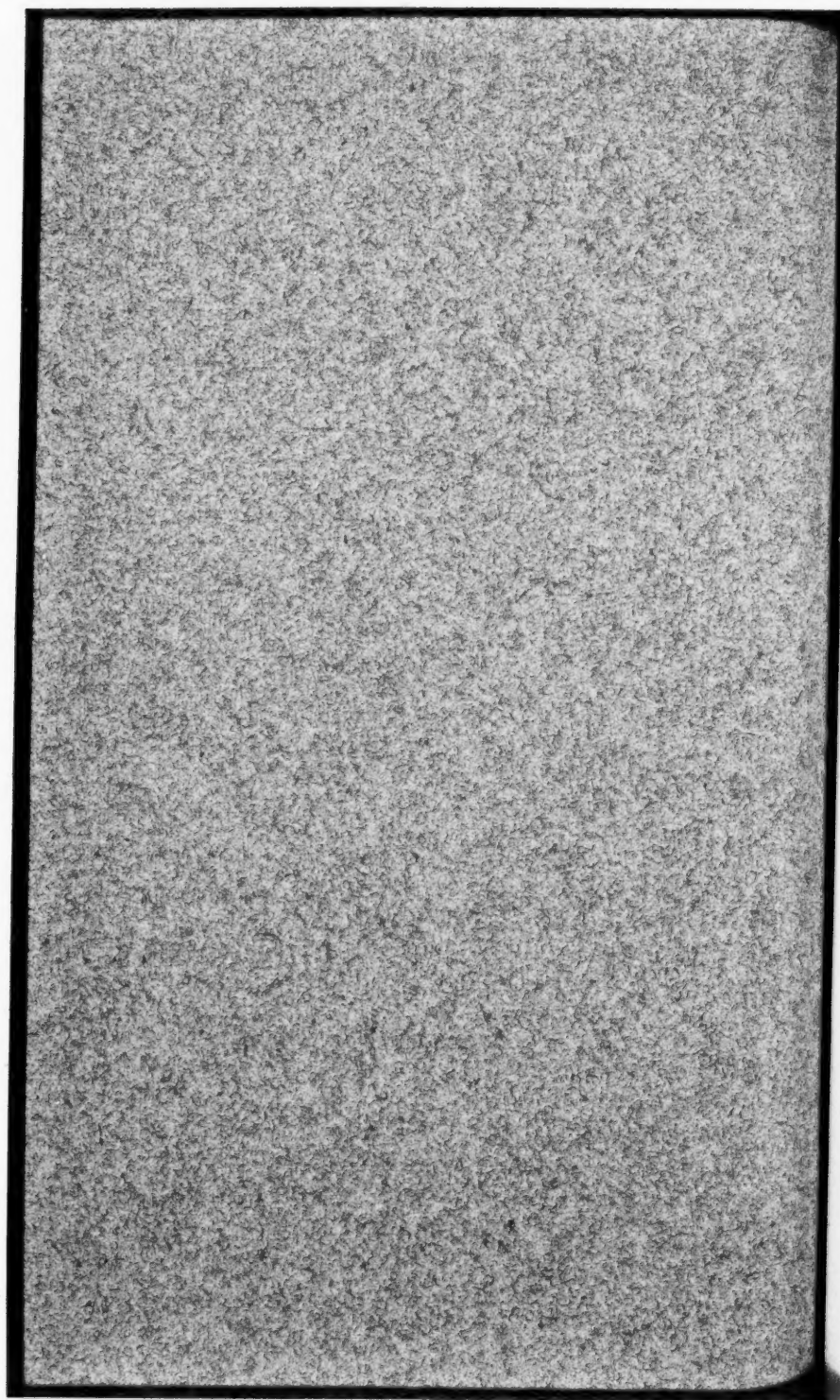
No. 260  
October Term,  
1910.

## MOTION TO ADVANCE.

ROBERT C. MORRIS,  
GUTHRIE B. PLANTE,  
Of Counsel for Appellant.

Form of Fremont Payne, 47 Broad St., N. Y., Phone 1150 Broad.







# Supreme Court

OF THE UNITED STATES.

STUART LINDSLEY,

Appellant,

against

NATURAL CARBONIC GAS COM-  
PANY, JAMES D. McNULTY and  
others,

Appellees

No. 260.  
October Term,  
1910.

2

PLEASE TAKE NOTICE that upon the record herein, upon the annexed petition, upon the affidavits herein of Stuart Lindsley, Guthrie B. Plante, William R. Hill and Edlow W. Harrison, verified June 30th, 1909; the affidavit of Clarence E. Reid, verified the 29th day of June, 1909; the affidavits of Alfred G. Heggem, Robert McNaughton, verified the 9th day of July, 1909; the affidavits of Edgar T. Brackett, and Guthrie B. Plante, verified the 12th day of July, 1909, which said affidavits are lodged with the Clerk of this Court; and upon all other papers and proceedings herein, we will move this Court at the court room of said Court in the Capitol Building, in the City of Washington, District of Columbia, on the ~~5th~~ 6th day of October, 1910, at the opening of court on that day, or as soon

3

- 4 thereafter as counsel can be heard, for an order advancing this case upon the calendar of the Court and setting same for argument at the earliest date convenient to the Court.

Dated, New York, September 16th, 1910.

ROBERT C. MORRIS,  
GUTHRIE B. PLANTE,  
Of Counsel for Appellant.

To

- 5 EDWARD R. O'MALLEY, Esq.,  
Attorney General of the State of New York,  
Counsel for Appellee.

CHARLES C. LESTER, Esq.,  
Counsel for Appellees.

NASH ROCKWOOD, Esq.,  
Counsel for Appellees.

## SUPREME COURT OF THE UNITED STATES. 7

STUART LINDSLEY,  
Appellant,  
against

NATURAL CARBONIC GAS COMPANY, WILLIAM S. JACKSON, as Attorney-General of the State of New York; JAMES D. McNULTY, WILLIAM E. WOOLLEY, GEORGE A. FARNHAM, WILLIAM D. ELLIS, JAMES M. ANDREWS, WILLARD LESTER, CHARLES C. VAN DEUSEN, D. PETER McQUEEN, SPENCER TRASK, HENRY S. CLEMENT, CORNELIUS SHEEHAN, ISRAEL PUTNAM, JOHN DON, JAMES H. BAKER, EDWARD W. KEARNEY, JULIUS H. CARYL, HARRY CROCKER, WILLIAM B. GAGE, WILLIAM B. HUESTIS, DOUGLASS W. MABEE, WINSOR B. FRENCH, CHARLES D. THURBER, BENJAMIN J. GOLDSMITH and WILLIAM M. HOES, individually and as members of the Citizens' Committee in Charge of the Movement to Restore the Saratoga Mineral Springs and the Prestige of Saratoga Springs as a National Health Resort; and FRANK H. HATHORN,  
Appellees.

No. 260.  
October Term,  
1910.

8

APPEAL FROM THE CIRCUIT COURT FOR  
THE SOUTHERN DISTRICT OF  
NEW YORK.

**Motion to advance appeal.**

9

The appellant above named respectfully moves to advance this cause and to set the same for argument at the earliest date convenient to the Court.

A similar motion was made by appellant at the opening of court at the October 1909 Term and denied without prejudice to renewal.

It is respectfully submitted that the needs of the situation, as hereinafter set forth, are such as to justify the Court again entertaining a motion to

- 10 advance and granting appellant a speedy hearing, the matters involved being of great moment not only to the individuals but to the public at large, and particularly to the entire population of Saratoga Springs.

The matter involved, briefly stated, is as follows: By a statute, Chapter 429 of the Laws of 1908, the State of New York prohibited the pumping of mineral water holding in solution natural mineral salts and an excess of carbonic acid gas from wells made by boring or drilling into the rock, and prohibited the use of artificial appliances in any such wells.

11

FIRST.—When the result of such pumping or operation is to accelerate the flow or produce an unnatural flow of the water or gas;

SECOND.—When the result of such pumping or operation is to lessen or impede the flow from any other spring or diminish or impair the quality or quantity of the carbonic acid gas or other mineral ingredients;

12

THIRD.—When such pumping or operation is for the purpose of extracting the gas and vending it separate from the water; and

FOURTH.—Prohibiting the doing of any act or thing whatsoever whereby the natural flow from any such well or spring is impeded or diminished or the quantity of gas diminished or the quality thereof impaired.

The statute declares the doing of any of the prohibited acts unlawful, and provides that any person violating the statute may be enjoined at the suit of the Attorney General or a taxpayer.

The appellant brought this cause in the Circuit Court, filing his bill on behalf of himself and all other bondholders and stockholders of the defendant, Natural Carbonic Gas Company, a corporation organized and existing under the laws of the State of New York, owning land in the Village of Saratoga Springs, New York, from which it was extracting mineral water and gas for the purpose of vending the water and gas separately. 13

The bill charges that the defendant, Attorney General of the State of New York and the other defendants, spring owners and members of the Saratoga Citizens' Committee, were threatening and attempting to enforce the provisions of said statute against the defendant company; that the statute in question is violative of Section 1 of Article 14, of the Constitution of the United States and unconstitutional and void, as taking property without due process of law and without compensation, and denying to the complainant and defendant gas company the equal protection of the law. 14

Application was made at Circuit at the commencement of the action for a preliminary injunction, which was refused, Mr. Justice Ward, by whom the matter was decided, basing such refusal practically upon the ground that the statute was not so clearly unconstitutional as to permit him to grant the injunction. 15

Lindsley vs. Natural Carbonic Gas Co.,  
162 Fed. Rep., 954.

Demurrers were interposed to the amended bill filed, but prior to the hearing before the Circuit Court upon such demurrers the Court of Appeals of the State of New York had considered and passed upon the statute here involved, holding the first,

- 16 second and fourth provisions to be unconstitutional and the third constitutional.

See

Hathorn vs. Natural Carbonic Gas Co.,  
194 N. Y., 326.

In so holding the Court of Appeals applied a new rule to the rights of property owners in underground percolating waters.

- 17 The learned Judge at Circuit, in considering the constitutionality of the statute, followed Hathorn vs. Natural Carbonic Gas Company, *supra*, and sustained the demurrers and granted a final decree dismissing the bill.

It is contended by appellant that at common law a land owner has a property right in the water and gas percolating under and through his land, and cannot be restrained from acquiring it.

- 18 It is submitted that, as the statute deprives the land owner of his right to pump and acquire the water, it takes his property contrary to the inhibition to the fourteenth amendment of the Constitution and is therefore void in all its provisions, it being contended by the appellant that the third provision of the statute is equally as broad as the other three that were rejected by the New York Court of Appeals, and therefore equally bad.

It can thus be seen by the Court that the case raises a fundamental question of the greatest importance, which has never been directly passed upon by this Court.

A number of cases are pending in the State court under the statute against the appellee, Natural Carbonic Gas Co., and against various other gas companies and spring owners of Saratoga Springs, the result of which will affect property to the value

of upwards of a million dollars, all such actions 19  
having been commenced since the commencement of  
this cause.

Such cases are as follows:

People vs. N. Y. Carbonic Acid Gas Co.  
Emily H. Hathorn and Frank H. Hathorn  
vs. Natural Carbonic Gas Co.  
People vs. Natural Carbonic Gas Co.  
People vs. Geysers Natural Gas Co.  
People vs. Lincoln Spring Co.  
People vs. Congress Spring Co.

These cases are at issue and on the Trial Term of 20  
the Supreme Court before Mr. Justice Betts at  
Kingston, N. Y., for trial. The trial of the first  
case, to wit: People vs. New York Carbonic Acid  
Gas Company, having been commenced January  
24th, 1910, and continued until February 4th, 1910,  
and then adjourned from time to time for comple-  
tion of the trial. In the period named six hundred  
and ninety-six (696) printed pages of testimony  
were taken, and the trial of that one action will  
take at least several weeks more time to complete.

The other actions will then have to be tried one 21  
by one and will consume a great amount of time  
and involve the defendants in tremendous expense.  
Such trials cannot be immediately completed, as no  
Justice of the Supreme Court, because of his regu-  
lar jury calendars and engagements, can complete  
even one of these cases at one sitting, but frequent  
adjournments must necessarily be taken while  
other calendars and cases are attended to, and the  
trials will be extended over a long period of time,  
and speedy determination cannot be had.

Moreover, in these cases the New York Court of  
Appeals in

22

People vs. Natural Carbonic Gas Company, 196 N. Y., 421,

in reversing a final judgment granted against the defendant company upon the pleadings, without proof of injury (proof offered by the defendant to show that there was no injury, having been excluded), held that if no injury resulted from such operations the statute had no application. By reason of expressions of Judge Gray, who wrote the prevailing opinion, claim is now made by the Attorney-General and sustained, that the burden of proving absence of injury is on the defendant.

23

The defendants in the above cases are therefore compelled to take the affirmative and prove by numerous witnesses, expert engineers, geologists and others, that no injury is resulting to any other property owner from their operations.

24

After the commencement of the six actions before mentioned the Reservation Commission of the State, acting under Chapter 569 of the New York Laws of 1909, appointed for the purpose of acquiring a State mineral water reservation at Saratoga Springs, N. Y., with a view to maintaining actions against the defendant company in this case and against the other companies above named, purchased a one-tenth interest in the Hathorn spring and a one-quarter interest in the property of the Champion Natural Carbonic Gas Company, and then commenced separate actions against each of the gas companies, joining in each case as co-defendants (because joint owners) the Hathorns and the Champion Natural Carbonic Gas Company. Such actions, it is contended by the Attorney General, are maintainable aside from the statute under common law rules as laid down by the New York Court of Appeals, because the State is now the



owner of property in the mineral water section. 25  
 These actions now at issue, but not noticed for trial, are avowedly brought by the Attorney General in anticipation of his being defeated in the actions against the same defendants, based solely upon the statute.

It thus clearly appears that even should the defendant company be successful in the actions based solely upon the statute, nevertheless it will still be subject to further prosecution by the Attorney General and the People in the action last mentioned, and all the other gas companies are similarly threatened in like actions.

The decision of this Court upon this appeal will, 26  
 however, control the final determination of all such actions, based either upon the statute or upon the common law, or both, and multiplicity of actions and years of litigation, with its enormous expense and resulting loss, will be prevented or avoided by an early decision here.

In the Hathorn case, which the Court of Appeals has held to be well founded, both under the statute and at common law, a temporary injunction has been granted against the defendant, which prohibits it from pumping any of its rock-driven wells for the purpose of extracting the gas and vending it separate from the water, and this injunction has crippled the defendant's business, caused it to suffer tremendous loss, and forced it into the hands of a receiver appointed by the United States Circuit Court for the Southern District of New York at the suit of a bondholder. 27

The property of the gas company, in which there has been invested by appellant and other stock and bondholders over half a million of dollars, is thereby threatened with destruction, its business is being ruined and dissipated, and appellant and others similarly situated are suffering irreparable injury.

28     The property, plant and appliances owned and operated by the defendant company in its gas and water business are not suitable for and cannot be used in any other enterprise, and will become of little value if the company is not speedily permitted to resume operations. The stock and bonds are thus being rapidly rendered valueless and the holders are threatened with a loss of their investments.

29     The appellee company, prior to the interference with its business by the State of New York, had enjoyed a business reputation second to none in the natural carbonic gas trade and was prosperous in every way, its business being a legitimate enterprise and not in any wise unlawful or wrongful, until the enactment of Chapter 429 of the Laws of 1908, and at the time it was granted its charter by the State of New York, with power to carry on this particular business, the acts now prohibited were not actionable at common law according to the rules laid down by the courts of England and by the courts, Federal and State, of the United States.

30     In the Circuit Court action, in which a receiver has been appointed for the company, a sale of all the property of the company is threatened, which will mean the destruction of the company and a loss by the bondholders and stockholders of their entire investments, unless speedy relief can here be obtained and a rehabilitation had of the company's affairs.

   The appellees contend that the statute is penal in its operation and effect, and that each act committed in violation thereof, being declared unlawful, is punishable under the New York Penal Code by imprisonment for one year or a fine of Five hundred dollars (\$500), or both. The defendant company is, therefore, threatened with a multiplicity of criminal prosecutions, with resulting fines, and defend-

ant's officers and servants are threatened with fines 31  
and imprisonment.

If a speedy hearing is not had herein, the defendant company will be ruined beyond repair, and should this Court subsequently hold said statute to be unconstitutional and reverse the decree of the Circuit Court, such reversal and decree of this Court thereon will be rendered ineffectual by the acts and prosecutions of the appellees. The purpose of such decree of this Court would be thus defeated and appellant would obtain no relief therefrom.

In addition, the various other companies mentioned will be similarly prosecuted, their business ruined and their employees deprived of employment, and the investors in their securities subjected to irreparable loss and injury. 32

On the 2nd day of July, 1909, appellant secured from Mr. Justice Peckham an order requiring the appellees to show cause before him at Altamont on July 13th, 1909, why an order should not be made enjoining them from enforcing the provisions of said statute until the hearing and determination of the appeal herein by this Court. Such application was subsequently heard before Mr. Justice Peckham at Altamont, on the 13th day of July, 1909, and thereafter a decision was rendered by him denying such application. The question of advancing this appeal was, of course, neither submitted to, nor considered, by him. 33

The affidavits and papers upon which such application was made to Mr. Justice Peckham, together with his opinion thereon, have been lodged with the Clerk of this Court and reference is hereby made thereto for all intents and purposes, same being submitted, together with the record herein, in support thereof.

34 The argument of this appeal, it is believed, will be brief and will occupy much less than the time usually allowed by the Court.

Appellant, therefore, respectfully prays this Court to advance this cause for argument, so that the validity of said statute, as tested under the provisions of Section I, Article 14, of the Constitution of the United States, may be finally determined by this Court, before complainant's property is entirely destroyed.

Dated, New York, September 16th, 1910.

35

ROBERT C. MORRIS,  
GUTHRIE B. PLANTE,  
Of Counsel for Appellant.

36

Office Supreme Court, U. S.  
FILED.

OCT 11 1910

JAMES H. McKENNEY,  
CLERK.

## Supreme Court of the United States.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY and others,  
Appellees.

No. 260.

### **Memorandum for Appellant on Motion to Advance.**

The appellant again moves to advance this cause for argument, a similar motion, made at the 1909 October Term, having been denied without prejudice.

The moving papers, together with the affidavits and other papers lodged with the Clerk of the Court, and referred to in the notice of motion, state fully the character of the litigation, the questions raised and the importance of the matters involved to the People of the State of New York, as well as to individuals.

We desire to supplement such papers, by pointing out to the Court the proceedings since the denial of the previous motion to advance in October, 1909 :

On October 18th, 1909, an appeal from final judgments of permanent injunction against the defendant in *People vs. Natural Carbonic Gas Company*, such judgments having been granted upon the pleadings, was argued before the Court of

Appeals, resulting in a reversal of such judgment on November 24th, 1909.

See *People vs. Gas Co.*, 196 N. Y., 421.

On January 10th, 1910, in *Hathorn vs. Natural Carbonic Gas Company*, defendant moved for leave to withdraw its demurrer and answer, such motion being denied on January 13th, 1910, with leave to renew.

On January 14th, 1910, such motion was renewed, resulting in the plaintiffs stipulating to permit the withdrawal of the demurrer and the service of an answer, the case being also stipulated by defendant for trial before Mr. Justice BETTS, at Albany, on January 24th, 1910.

On January 24th, 1910, six cases against the Saratoga Gas Companies, all for the purpose of obtaining injunctions restraining the pumping of mineral water, two of such cases being the cases above mentioned against this defendant, came on for trial at Albany before Mr. Justice BETTS. The trial of the first case, to wit: *People vs. New York Carbonic Acid Gas Company*, was commenced and continued until February 4th, 1910.

The defendant, realizing that it would be months at least before one case could be completed, and four cases preceding its case upon the trial calendar, on January 28th, 1910, obtained from Mr. Justice BETTS, and served upon the plaintiffs' attorney in *Hathorn vs. Natural Carbonic Gas Company*, an order to show cause why the injunction *pendente lite* theretofore granted in that action, should not be vacated. Such application was returnable on February 2d, 1910, at Albany, and on application of plaintiffs' counsel, adjourned to February 8th at Kingston.

On February 8th, 1910, such motion was argued, and submitted upon briefs on February 15th.

On May 24th, 1910, such motion was denied by Mr. Justice BETTS without opinion.

An appeal from the order thereon was at once taken, and such appeal argued before the Appellate Division of the Supreme Court, for the Third Department, on September 27th, 1910, no decision thereon having yet been rendered.

The trial of the various cases above referred to were adjourned from time to time to September 19th, 1910, continued

on September 19th and 20th, and then adjourned to November 28th, 1910.

On March 28th, 1910, summons and complaint in an action by the People of the State of New York, as plaintiffs, against the Natural Carbonic Gas Company, Emily H. Hathorn, Frank H. Hathorn and Champion Natural Carbonic Gas Company, was served upon the defendant.

Such action alleged the purchase by the plaintiffs of a tenth interest in property owned by the Hathorns, and purchase of a quarter interest in property owned by the Champion Natural Carbonic Gas Company; alleged the other facts set up in the pleadings in the actions, Hathorn vs. Natural Carbonic Gas Company and People vs. Natural Carbonic Gas Company, and asked for judgment of permanent injunction against the defendant, restraining it from pumping on its property at Saratoga Springs.

The answer of the defendant in such action was served May 5th, 1910.

In June, 1910, plaintiffs obtained an order for the examination of the defendant before trial, which order, on application of the defendant, was vacated on July 13th, 1910.

An appeal was taken by the plaintiffs from such vacating order, and argued before the Appellate Division on September 28th, 1910, no decision thereon having yet been rendered.

The last-named case, People vs. Natural Carbonic Gas Company, Hathorn, *et al.*, is brought by the plaintiffs for the same relief sought in the other actions, the right thereto being claimed at common law only, and not upon the anti-pumping statute.

The right of the People to bring such action is predicated upon its interest in the property of the two defendants (against whom no judgment is asked), which interest was purchased for the purpose of maintaining such action. The action, although at issue, has not been noticed for trial.

The case of Hathorn vs. Natural Carbonic Gas Company is brought both upon the statute and under the common law, and the case of People vs. Natural Carbonic Gas Company, upon the statute alone.

As stated in the moving papers, the actions against the other Gas Companies of Saratoga and against this defendant will have to be tried one by one, and will consume a great

amount of time, and involve the defendant in tremendous expense.

No Justice of the Supreme Court, apparently, because of his regular jury calendars and other assignments, can complete even one of these Special Term cases at one sitting, frequent adjournments must be taken while other calendars and cases are disposed of, the trials will be extended over a long period of time and speedy determination and relief to the defendants cannot be had.

Moreover, the Court of Appeals, by its decision,

People vs. Natural Carbonic Gas Co., 196 N. Y.,  
421,

has placed upon the defendants the burden of affirmatively proving, to avoid an application of the statute, that no injury results from their operations.

Aside from the injustice of such a ruling and the hardship imposed upon the defendant thereby, the defendant is involved by reason thereof, in a tremendous trial expense, which would be unnecessary were it not required to prove a negative, to wit: that pumping by the defendant does not affect adjoining property.

The decision herein of this Court will control upwards of ten actions in the State Court, and put an end to a vast amount of litigation, and save the defendant from enormous expense.

In 1909 an act (Chapter 569 of the laws of 1909) was passed by the Legislature of the State of New York, providing for the establishment and maintenance at Saratoga Springs of a State Reservation to comprise the mineral water producing properties. Such statute provided for the appointment (since made) by the Governor, of a commission of three to be known as the Reservation Commission, and provided for the raising of six hundred thousand dollars (\$600,000) by bond issue, to secure to the commission funds for the purchase of the necessary properties.

In view of the unsettled condition of the law of percolating waters in New York, the commission was met at the outset of its administration with the practical difficulty of determining which properties it was necessary to acquire for the purposes of such reservation, such question seemingly depending to a large extent upon the right each individual



owner possessed to reduce to possession, and make use of, the water percolating through or under his property.

The Commission without attempting any real investigation of the subject, took sides with the water dealers against the Gas Companies, purchased one-tenth and one-quarter interests, respectively, in the Hathorn and Champion properties (the owners of which are the chief exponents of the anti-pumping movement) for the sole purpose of commencing, and did commence as aforesaid, actions against the Gas Companies to restrain them from operating their properties.

The net result has been multiplicity of litigation and a situation that has made it impossible for the Commission to determine the value of any property and acquire the same, for reservation purposes, so that the carrying out of the reservation statute has been held up and its whole purpose endangered of being entirely defeated, as the appropriation of six hundred thousand dollars (\$600,000) will lapse if not used by May 1st, 1911. This is well illustrated by the action of Governor Hughes, of the State of New York, in vetoing on June 26th, 1910, a bill passed by the legislature providing for the raising of an additional two hundred thousand dollars (\$200,000) for said reservation purposes, it being stated by him that until the questions involved were settled, and the prior appropriation of six hundred thousand dollars (\$600,000) spent, no necessity appeared for the appropriation then under his consideration.

In placing his veto on the additional appropriation Governor Hughes said (we rely on newspaper quotation) :

"The investigations conducted by the commission appointed under the act 1909 have confirmed the view of the importance to the people of the State of conserving the mineral springs at Saratoga, and of the propriety of action by the State to that end. The commission has been deeply interested in the matter, and, at the same time, careful to safeguard the State against an improvident outlay.

"The litigation under the act of 1908, with respect to pumping, is still in progress, and while negotiations have been under way, the offers received have not been such as to permit a satisfactory arrangement for the

acquisition upon reasonable terms of the properties essential to the reservation. There is no sufficient ground, in my judgment, for a further appropriation."

A speedy decision here will, therefore, not alone prevent the destruction of the defendant Gas Company by injunctions before its day in court can be had, but will determine such questions as will permit the carrying out of a great public work in the State of New York.

Since the service of the motion papers on the counsel for the appellees, including the Attorney General, we have been informed by them that they join with us in asking for an advancement of this appeal.

Respectfully submitted,

ROBERT C. MORRIS,  
GUTHRIE B. PLANTE,  
Of Counsel for Appellant.

1

THE

THE

THE

THE

THE

THE

# Supreme Court of the United States.

STUART LINDSLEY,  
Appellant,

AGAINST

NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY, and others,  
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

## **BRIEF OF COUNSEL FOR APPELLANT.**

### **Introductory Statement.**

This action was commenced in the Circuit Court for the Southern District of New York. It was brought by Stuart Lindsley as owner and holder of bonds and capital stock of the defendant-appellee, Natural Carbonic Gas Company, in his own behalf and on behalf of others similarly situated to have Chapter 429 of the Laws of 1908 of the State of New York declared illegal and void because in contravention of the Fourteenth Amendment of the Constitution of the United States, and to have the defendants other than the Gas Company restrained from in any way enforcing or attempting to enforce the provisions of said act, and to have the Gas Company restrained from in any wise obeying the same.

The facts shown by the amended bill, stated briefly, are :

That the Gas Company is the owner of certain lands in the Village of Saratoga Springs, New York, from which are obtained natural carbonic acid gas in dry form and mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, which water and gas do not exist in any underground reservoir, have no well defined underground courses or channels, but are percolating waters only ; that such gas and waters do not flow to or upon the surface of the ground, but can only be reached and acquired and brought to the surface for use by the use of pumps or similar or other artificial appliances ; that the Company is engaged in the business of extracting such waters, compressing and vending the gas separate from the water, as well as bottling and selling the water, and for the purpose of carrying on such business an expensive plant, equipped with costly and valuable machinery, has been erected by the Company upon such property, in which appellant and other bondholders and stockholders of the Company have invested upwards of a half million of dollars ; that in order to reach said mineral water, containing in solution natural carbonic acid gas in or under its said land, the defendant Company has sunk or drilled wells to the depth of several hundred feet in or upon its lands ; that such wells are made by boring or drilling into the rock and are fitted with tubing and seals and lift pumps by means of which the percolating mineral waters and the gases therein are raised to the surface ; that such pumps do not suck the gases or waters from the land or exercise any pervasive force therein or exercise any force of compulsion upon waters in or under adjoining lands, but lift only to the surface, such waters and gases as flow by reason of the laws of nature into the wells upon its property ; that the statute in question, Chapter 429 of the Laws of 1908 of the State of New York, prohibits the pumping of water and gas and the acquiring of the same by artificial appliances when the object of such acquisition is to market the gas separate from the water as well as by sundry other provisions prohibiting absolutely the pumping of any such water and gas ; that the defendants were threatening and attempting to enforce the statute against the Company to the irreparable injury of the complainant and the Company ; that the statute is violative of Section I. of

Article XIV. of the Constitution of the United States and unconstitutional and void as taking property without due process of law and without compensation and denying to complainant and defendant Company the equal protection of the law ; that the complainant is the owner of mortgage bonds, debenture bonds and stock of the defendant Company, the mortgage bonds being secured by mortgage upon all the aforesaid property. and that all such securities are threatened with destruction by the enforcement of said statute against the Company, etc.

Upon the case coming on to be heard upon demurrers to the amended bill, a final decree was entered dismissing the amended bill from which decree this appeal is taken.

The statute in question follows :

“ AN ACT for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters.”

“ Became a law, May 20, 1908, with the approval of the Governor. Passed, three-fifths being present.”

“ *The People of the State of New York, Represented in Senate and Assembly, do enact as follows* ” :

“ SECTION 1. Pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow or producing an unnatural flow, of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, is hereby declared to be unlawful. Pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow, of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow of, natural

carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, by reason whereof the natural flow from any mineral spring or any mineral well belonging to any other person or corporation, is impeded, retarded, diminished, diverted or endangered, or the quality of its waters is impaired, or the quantity of its carbonic acid gas or mineral ingredients diminished, is hereby declared to be unlawful. Pumping, or otherwise drawing by artificial appliance from any well made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of, carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful. The doing of any act or thing whatsoever whereby the natural flow from any spring or well of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas is impeded, retarded, diminished, diverted or endangered, or the quality of its waters is impaired, or the quantity of its carbonic acid gas or mineral ingredients diminished, is hereby declared to be unlawful."

"§ 2. Any citizen of the state may maintain an action to restrain any person or corporation from committing any of the unlawful acts specified in section one of this act, in any city or town in which said citizen is assessed for and is liable to pay, or within one year before the commencement of the action, has paid a tax."

"§ 3. The attorney-general may at any time, in the exercise of his discretion, bring and maintain an action in the name of the people of the state of New York, to restrain any person or corporation from any of the unlawful acts specified in section one of this act. It shall be the duty of the attorney-general to institute and prosecute such an action, upon the written request of

ten citizens of this state who are assessed for taxes therein and whose aggregate assessments amount to not less than ten thousand dollars, and who shall state, in writing, facts and circumstances showing any such unlawful act or acts and give an undertaking with sureties to be approved by a justice of the supreme court to indemnify the people against the costs of such action."

"§ 4. The provisions of section eight hundred and seventy of the code of civil procedure shall apply to any action brought under this act and no person shall be excused from answering on the ground that his examination would tend to convict him of crime, but such answers shall not be used against him in any criminal prosecution for violating the provisions of this act."

"§ 5. Nothing in this act contained shall be construed to affect the Onondaga salt springs reservation, located in Onondaga County, or the springs of any county adjacent thereto.

"§ 6. This act shall take effect immediately."

The appellant assigns as error on this appeal (Record, pp. 27, 28) that the Court erred in sustaining the demurrers of the defendants to the bill as amended and in dismissing the bill in that the said statute is in contravention to the Constitution of the United State especially of Section I. of Article XIV. thereof because (1) it deprives the complainant and the defendant Company of liberty and property without compensation and without due process of law ; (2) discriminates unlawfully against one class of persons and property owners to its injury and for the benefit and profit of another class, as well as between individuals of the same class ; (3) discriminates unlawfully against certain localities ; and (4) provides for the taking of private property for private purposes.

### **History of the Legislation.**

The statute complained of became a law with the approval of Governor Hughes on May 20th, 1908.

The defendants who had furthered the act, then demanding that the defendant Company forthwith cease all its busi-



ness operations and threatening to enforce the statute against the Company, the appellant filed his bill herein on the 3d day of June, 1908. At the time of the filing of the bill an order was issued by Judge WARD at Circuit, directing the defendants to show cause why an injunction as prayed for in the bill should not issue during the pendency of the action, such order to show cause containing a restraint against the defendants until the hearing thereon. Subsequently Judge WARD vacated such restraint before the hearing and later denied the application for an injunction *pendente lite* because he thought the statute not so clearly unconstitutional as to justify the granting of a preliminary injunction.

Lindsley v. Gas Company, 162 Fed. Rep., 954.

Thereafter the appellee Frank H. Hathorn and another, claiming to be owners of mineral water producing property in Saratoga Springs, commenced an action in the New York Supreme Court against the defendant Company to restrain it from all pumping operations, claiming to be entitled to the relief sought both under the statute and at common law.

Thereafter an application was made to the Special Term for an injunction *pendente lite* and granted upon the statute, Mr. Justice HOUGHTON deciding to hold the statute constitutional because he felt that the question should be left to the Appellate Court and the statute given the benefit of the presumption of its constitutionality when there was reasonable doubt concerning it.

See Hathorn v. Gas Company, 60 Misc., 342-345.

Upon an appeal from such injunction order to the Appellate Division one of the provisions of said statute was declared to be unconstitutional and the injunction order modified accordingly, and as modified, affirmed, COCHRANE, J., dissenting.

See Hathorn v. Gas Co., 128 App. Div., 33.

Upon a further appeal to the Court of Appeals, the statute was considered by that Court, and three of its four prohibitions held to be unconstitutional and the fourth constitutional, and the injunction order affirmed, HAIGHT, J., dissenting, and CULLEN, C. J., concurring, in result only.

Hathorn v. Gas Co., 194 N. Y., 326.

Meanwhile seven similar actions upon the statute had been commenced by the People against the Natural Carbonic Gas Company and other Gas Companies and property owners in Saratoga. In such actions preliminary injunctions granted in advance of trial were subsequently vacated by the Appellate Division, that Court considering the granting of such injunctions an improper exercise of judicial discretion, inasmuch as the defendants could not be protected by adequate security.

See *People v. Gas Co.*, 128 App. Div., 42.

After the decision of the Court of Appeals was rendered in the Hathorn case on February 23d, 1909, the litigation progressed with its series of motions, appeals and the like until September, 1909, when the seven cases brought by the People came on for a trial at an Extraordinary Term of the Supreme Court, appointed by the Governor for the purpose of trying such actions. Upon such trials, final judgments of permanent injunction were granted in favor of the plaintiffs against the defendant in each of said cases, such judgments having been granted upon the pleadings without proof of injury from the respective defendant's operations or of interference with any common source of supply and upon an exclusion of proof offered by the defendants to show that there was, in fact, no such injury or interference.

A *pro forma* affirmance was taken at the Appellate Division of such judgment and upon an appeal therefrom to the Court of Appeals, such judgments were reversed and new trials ordered, CULLEN, C. J., HAIGHT and BARTLETT, JJ., concurring only in the result.

See, *People v. Gas Co.*, 196 N. Y., 421.

In 1909 an Act, Chapter 569 of the Laws of 1909, was passed by the Legislature of the State of New York, providing for the establishing and maintenance at Saratoga Springs of a State Reservation to comprise the mineral water producing properties. Such statute provided for the appointment by the Governor of a Commission of three to be known as the Reservation Commission and provided for the raising of Six hundred thousand dollars (\$600,000) by bond issue to secure to the Commission funds for the purchase of the necessary property.

The Commission, seemingly without any investigation, sided at once with the opponents of the Gas Companies and after the decision of the Court of Appeals in the People case, purchased one-tenth and one-quarter interests, respectively, in the Hathorn and Champion properties (the owners of which are the chief exponents of the anti-pumping movement) for the sole purpose of commencing, and did commence, actions against the Gas Companies to restrain them from operating their properties. Such actions were commenced in the early part of the year and are now at issue, although not upon any calendar for trial. The plaintiffs therein, The People of the State of New York, claim to be entitled to the same relief as sought in the other actions, a judgment of permanent injunction against pumping the mineral water and gas, the right thereto being claimed at common law by reason of their present ownership and not under the statute.

In July, 1909, application was made to the late Mr. Justice PECKHAM for an order enjoining the appellee from further proceedings to enforce the statute until this appeal should be decided by this Court. Such application was denied in an opinion rendered July 19th, 1909, copies of which opinion have been lodged with the Court. Mr. Justice PECKHAM, however, in rendering such decision, did not express any opinion on the constitutional questions herein involved.

It will be seen from the foregoing statement that in no Court has the statute been unqualifiedly upheld, and that in the appellate State Courts wherein the statute is sustained in part after obvious effort, there are dissents and dissenting opinions by several of the Justices. The case is not one in which the legislative act has met with the unqualified approval of the State Courts with the presumption of validity against the appellant's contention, but, on the contrary, is one that presents for the consideration of this Court a statute that has been in large part condemned by all Judges who have considered it, and not only seriously questioned, but directly challenged and condemned in its entirety by some.

## ARGUMENT.

The assignment of errors filed (Record, pp. 27, 28) present several questions involving objections to the statute that appear upon its face. In brief, these questions are as follows :

(1) That the statute takes the appellant's and the company's property by prohibiting the pumping of gas and water for the purpose of vending the gas separate from the water, thereby depriving the defendant, without due process of law, of property rights in its land and the minerals therein.

(2) That the statute, by prohibiting the pumping of water for the purpose of vending the gas separate from the water, while permitting pumping for the purpose of selling the water without, or apart from, the gas, denies the equal protection of the laws.

(3) That the statute, by prohibiting pumping for the purpose of vending the gas separate from the water, and permitting pumping for any other purpose, even permitting wanton waste, denies the equal protection of the laws.

(4) That the statute, by prohibiting the pumping of wells drilled into the rock for the purpose of vending the gas and permitting the pumping of wells not driven into the rock for the purpose of vending the gas or for any other purpose denies the equal protection of the laws.

(5) That the statute prohibiting the pumping for the purpose of vending the gas and permitting the pumping for the purpose of vending the water or for any other purpose deprives the appellant and the company of property, *i. e.*, the right to pump, for the benefit of other property owners engaged in the water and gas business, and thereby takes private property for private purposes.

All these questions were raised in the Court below and swept aside by Judge LACOMBE's memorandum decision, in which he sustains the demurrers on the authority of the Court of Appeals in the Hathorn case.

Lindsley v. Gas Co., 172 Fed., 1023.

Such questions are now presented for the consideration of this Court in the following points. They are discussed in the order stated and urged with equal insistence.

## I.

**The Statute violates Section 1 of Article XIV. of the Constitution of the United States in that it deprives the Natural Carbonic Gas Company of liberty and property without compensation and without due process of law.**

In using the term "liberty and property" we do so in the broad sense that the words are construed to have been used in the Constitution of the United States, and in a strictly legitimate sense in law, that interference with the profitable and free use of property by its owner arbitrarily deprives him of his property and of some portion of his personal liberty.

Chicago, etc., Ry. v. Minnesota, 134 U. S., 418.

Smyth v. Ames, 169 U. S., 466-523.

Munn v. Illinois, 94 U. S., 113.

*In re Jacobs*, 98 N. Y., 98.

People v. Otis, 90 N. Y., 48-52.

At common law the owner of land has a property right in all water and gases that percolate or flow through the soil or rocks, that he is able to reduce to possession, and to use the same for his own purposes at his free will and pleasure, and it has never been questioned but that he may dig ditches or sink wells, or in any other manner exercise his dominion over his own land without being liable for the interception and diversion of any underground percolating waters consequent upon such use of his own property. Therein the law of percolating waters and of running streams radically differs and the two should not be confounded.

The leading case on this subject of percolating waters is

Acton v. Blundell, 12 Mees. & Wels, 324.

There the defendant had sunk a coal pit upon his land with the result that it drained the percolating water and made dry a well upon the plaintiff's land.

It was held that there could be no recovery, the Court saying :

"But if the man who sinks the well in his own land can acquire, by that act, an absolute right to

the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil, which shall interfere with the enjoyment of the well. He has the power, also, of debarring the owner of the land in which the spring is first found from draining his land for the proper cultivation of the soil."

In

*Chasemore v. Richards*, 7 H. L. cas., 349,  
the plaintiff was the owner of an ancient mill, situated upon a running stream and was entitled to the flow of the stream for the purpose of working his mill, and had so enjoyed the waters for upwards of sixty years.

The stream was supplied largely by waters produced by the rain-fall on a water-shed of many thousand acres lying above the river and above plaintiff's mill. These waters ran into the ground at various depths and then flowed and percolated through the underground strata toward and under the stream. In some instances these waters rose to the surface in springs and often they flowed as in little streams into the river, in several instances finding their way wholly underground to the river.

The local authorities of the Town of Croyder, for the purpose of obtaining a water supply for that town, sank a large well to the depth of seventy-four feet upon their own land within the district of the water-shed and about a quarter of a mile from the head of the stream, which supplied the power for the plaintiff's mill. They erected steam pumps on their land and pumped between five hundred thousand and six hundred thousand gallons of water daily from a well into a reservoir, which flowed thence in pipes into the town and was used by the inhabitants. The water so pumped was largely subterranean, percolating water, which but for the well and pumping, would have found its way to the stream above plaintiff's mill. The interception and diversion of these underground waters interfered with the volume of water theretofore at the service of the mill and produced a loss to the plaintiff. The action was against the town authorities and judgment was given for the defendant, which was affirmed by the Court of Exchequer and by the House of Lords.

This case clearly annunciates the doctrine that there is no right of use by a riparian owner of water entering a stream by percolation and that an adjoining owner through which the water percolates may cut it off with impunity, even though it perceptibly diminish the flow of water in the stream and inflicts damage upon the riparian proprietor.

The basis upon which the rule rests, the Court found to be that the proprietor of the land owned the percolating water therein as a part of the soil, and that he possessed the clear legal right to make use of the same in any manner that he chose, even though it cut off the supply of water to running streams and divert water, which otherwise would flow upon adjoining lands.

The doctrine of an earlier case *Dickinson v. Canal Company*, 7 Exch., 280, to the effect that to divert water from a running stream is unlawful where the water was abstracted before or after it reached the channel, was repudiated and the rule in *Acton v. Blundell*, was accepted as decisive of the principle involved.

The most recent expression of the English law on this question is to be found in the decision of the House of Lords made in July, 1895, in *The Mayor, etc., of Bradford v. Pickles*, reported in the *Law Reporter*, 1895, Appeal Cases, at page 587. In this case the Borough of Bradford had sunk wells, built reservoirs and constructed a system of water supply for its inhabitants, using for such purposes the underground percolating waters of the contiguous territory, which had found their way to the lands owned and used for the purpose by the Borough. A landowner named Pickles, desiring to force the Borough to buy his lands, under the pretext of making preparations for mining, sunk shafts and wells on his own lands, thus lowering the water level in the neighborhood. This resulted in the interception and diversion of the underground water supply formerly enjoyed by the Borough. The Borough sought to enjoin Pickles. The defendant was successful in all Courts, the House of Lords dismissing the final appeal of the plaintiff. The Courts below distinctly reannounced the rule of *Chasemore v. Richards*, *supra*, as applied to the interception of underground percolating waters, and in this the House of Lords unanimously concurred. The fact that the defendant had exercised his legal rights to club the Borough

into a purchase of his lands at his own price was held to be immaterial to the case.

The case of *Acton v. Blundell*, *supra*, was early followed in this country

In

*Chatfield v. Wilson*, 28 Vt., 49,  
it was held that no action would lie for diversion of underground waters, the supplies to the river Wandle, as the diversion was not of any water which had already joined the river or any surface stream running into it.

In

*Roath v. Driscoll*, 20 Conn., 533,  
the Connecticut Court refused to grant relief upon a state of facts similar to *Acton v. Blundell*.

In

*Pixley v. Clark*, 35 N. Y., 520,  
the common law rule pertaining to percolating waters in the State of New York is stated (p. 526) :

"An owner of the soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So, the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner, for interfering with or destroying percolating or circulating water, under the earth's surface."

This rule was later approved and followed in many New York cases, chief among them being

*The Village of Delhi v. Youmans*, 45 N. Y., 362, where the Court at page 363 said :

"If the action of the defendant took the water away from the springs, after it had reached there, after it had become part of an open, running stream, then this action would lie."

"But if it merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon the defendant's own land, for the use of his family



and stock, this action will not lie. The law is settled in that way, both here and in England."

And

Bloodgood v. Ayres, 108 N. Y., 400,  
where it is said (p. 405) :

"No stream or water-course ran from the spring. The source from which it came and the flow of its waste or surplus were alike underground, concealed, and matters of speculation and uncertainty. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface; and none of the rules relating to water courses and their diversion apply.

"The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious and flow in a natural channel between defined banks. A few such exceptions are admitted to exist, and others may occur; but, outside of these, sub-surface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water-courses, and they may be intercepted or diverted by the owner of the land for any purpose of his own."

In Wisconsin the rule established by the cases cited was adopted at an early date and recently reiterated in

Huber v. Merkel, 117 Wisc., 368, 94 N. W., 354.

"The principles of the common law regulating the rights of landowners in subterranean waters are well understood. If the waters simply percolate through the ground, without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume, or cut them off with impunity."

"From this brief review of the law and the cases relied upon as modifying the ancient common-law rule as to percolating waters, it seems clear that it must be held that the appellant had a clear right at common

law, resulting from his ownership of land, to sink a well thereon, and use the water therefrom as he chose, or allow it to flow away, regardless of the effect of such use upon his neighbors' wells, and that such right is not affected by malicious intent. Whether this right results from an absolute ownership of the water itself, as stated in some of the authorities, or from a mere right to use and divert the water while percolating through the soil, is a question of no materiality in the present discussion. In either event, it is a property right, arising out of his ownership of the land, and is protected by the common law as such."

The doctrine of the foregoing cases also received the approval of this Court, in

United States v. Alexander, 148 U. S., 186,  
in which case Mr. Justice SHIRAS delivering the opinion of the Court said (p. 192) :

" Finally, an argument in favor of the government is based upon the finding of the court below, that it does not appear that the well was supplied ' by a distinct vein of water running into it ; ' and the leading case of *Acton v. Blundell*, 12 M. & W., 324, and cognate cases are cited.

" The doctrine of those cases substantially is, that the owner of land may dig thereon and apply all that is there found to his own purposes at his free will and pleasure ; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

" We recognize this as sound doctrine in the ordinary case of a question between adjoining owners of land."

In recent years the New York Courts have had occasion to consider and decide new phases of the question of property rights in percolating water. First, involving the right to in-

tercept percolating water constituting the source of supply ponds, springs and running streams ; second, the rights of adjoining owners of land to extract the percolating water not for use upon the land but for transportation and sale ; and third, the right of a municipal corporation to sink wells and by means of powerful suction pumps draw to its pumping station the subsurface waters percolating in the soil over an area of five to ten square miles to the destruction of all lands within such area for purposes of agriculture and the liability thereby incurred to the adjoining proprietors.

Smith v. City of Brooklyn, 18 App. Div., 340.

Same v. Same, 32 App. Div., 257 ; *affd.*, 160 N. Y., 357.

Merrick Water Co. v. City of Brooklyn, 32 App. Div., 454 ; *affd.* without opinion, 160 N. Y., 657 ;

Forbell v. City of New York, 47 App. Div., 37 ; *affd.*, 164 N. Y., 522.

In the Smith case the City of Brooklyn, for the purpose of obtaining a water supply for its inhabitants, acquired certain lands in Queens County, installed thereon a water station, sunk wells and fitted them with powerful pumps, with the result that a vast quantity of water was drawn from the surrounding country resulting in the destruction of a brook and pond of the plaintiff, and of a number of wells. The Court of Appeals held the plaintiff was liable for the destruction of the running stream, refusing, however, to consider the rights in percolating water not connected with the supply of a surface stream, as not presented by the case under consideration (160 N. Y., 357, at 360-361) :

" It is settled by the decision of the courts of this state, and it is the rule in England, that no one may divert, or obstruct, the natural flow of a stream for his own benefit, to the injury of another. (*Pixley v. Clark*, 35, N. Y., 520 ; *Van Wycklen v. City of Brooklyn*, 118 *ib.*, 424 ; *Covert v. Crawford*, 141 *ib.*, 521 ; *Chasemore v. Richards*, 7 H. L., 349, and *Grand Junction Canal Co. v. Shugar*, L. R. (6 Ch. App.), 483."

" All the cases hold that the water of a natural surface stream is for the benefit of all the riparian owners and that to divert, or to diminish, its flow in any way,

is an interference with a natural right, which will give rise to an action for the injury sustained."

"That the diversion and diminution of the stream were caused by arresting and collecting the underground waters, which, percolating through the earth, fed the stream, does not affect the question \* \* \* it may be another thing to collect and to use the waters which percolate through the earth in underground ways and channels without having connection with the supply of a surface stream. The latter question does not demand an answer upon the case before us."

In the Forbell case (*supra*) the sole question involved, was the right to divert or intercept the flow of percolating water, and draw it to one spot. The plaintiff was the owner of land on which he cultivated celery and other vegetables requiring a wet soil for their proper production. The defendant by its pumping had drawn away the subsurface waters destroying the land for such purposes.

The Supreme Court held that such accumulation of water was not the exercise of a legal right in the use of the land as against the adjoining owner and that liability attached; that the reasoning which upholds property rights in percolating water wholly fails when applied to such a situation; that it is of no consequence that the flow of the subsurface water was concealed and unknown since what was known was the fact that when the pumps were installed, their operation would draw substantially all the water to a given spot and despoil the owners of the adjoining lands of its beneficial use and enjoyment; that carried to its logical result it would authorize the destruction of the adjoining land for the purposes of agriculture, and practically convert it into a desert, without the slightest pretence of improvement of the defendant's land for any purpose of beneficial enjoyment. The Court of Appeals affirmed this judgment against the defendant, practically adopting the reasoning of the Supreme Court.

In the Merrick Water Case (*supra*) the plaintiff, a corporation, engaged in the business of extracting percolating water from its lands and selling it to its various customers brought suit against the City of Brooklyn to enjoin it from the continuance of its pumping operations upon its neighboring prop-

erty the admitted result of which had been the interruption of the percolating of water to the plaintiff's wells and the lowering of the water in such wells.

The plaintiff had judgment, which was reversed by the Appellate Division (32 App. Div., 454).

It was averred in the complaint in that case that the land occupied by the plaintiff and from which it obtained its water supply was located on a subterranean stream supplied from a water shed, which was particularly described; that such underground stream rose to the surface on the plaintiff's land and flow into ponds owned by it. The trial Court found the effect of the defendant's pumping had been to permanently lower the water in plaintiff's well from seven to eight feet by drawing the water from under the plaintiff's well and the land on which it was situated. The evidence failed to support the averment that there existed a subterranean stream of water, which supplied plaintiff's well. The proof was that the diminution of water in the plaintiff's well was caused by the interruption of percolating water.

The case very clearly presents the question of the diversion of percolating water by one owner from the lands of another, *both of which are engaged in the collection of water*, not for use upon the land itself, but for purposes of transportation and sale to third persons, who have no interest or right of use of water as connected with the land.

The decision of the Appellate Division was affirmed by the Court of Appeals without opinion (160 N. Y., 657). The decision in this case is directly applicable to the facts in the case at bar, and determines the rights of the Gas Company and of the Hathorns and the other mineral spring owners except as they are affected by the statute of 1908.

In the course of the opinion of the Appellate Division (32 App. Div., 454), in which all the Justices concurred, the Court said of the Smith case (*Supra*, pp. 455, 456, 457) :

"That case presented the question of the relative right of the defendant and an adjoining landowner, who made use of his land and the running stream and pond thereon in connection with the land and for the purposes of its beneficial enjoyment. And this court held that as the defendant collected the water upon its land,

not for any purpose of beneficial enjoyment of the land itself, but for purposes of transportation and sale at a distant place to others having no right to it as against the owner of the land who was deprived of his stream and pond, it was an unlawful diversion of the water by the defendant for which the plaintiff had his right of action. And we further held that under the circumstances of that case the act of the defendant diverted the water from a running stream in which the plaintiff had a property right and that such diversion was unlawful. But being mindful of the delicate nature of the question we were deciding, we expressly limited the rule to the particular case and its facts, announcing that no fixed rule could be laid down, but that each case must rest upon its particular facts as applied to the doctrine of reasonable use and relative rights. The effect of that decision was to limit the right to divert percolating water by an adjoining owner of land to cases where the diversion was produced by the exercise of a legal right to improve the land or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture or mining, or by structures for business carried on upon the premises, or other improvements either public or private. We recognized the rule that no liability was created by such use of the land, even though the effect of it was to divert the percolating water from the land of the adjoining owners. This rule is firmly settled in the law of this State and elsewhere, as appears by the decisions cited upon page 342 of the Smith case, and is only qualified by the diversion of water from a running stream which has existed from time immemorial. As to it the maxim *sic utere tuo ut alienum non lædas* is applicable, and from the inherent difficulty resting in the nature of the rights of each party, can only be settled upon the facts out of which the controversy arises. It is, therefore, manifest that the decision in the Smith case is not controlling of the present controversy.

"In the present case both corporations seek to obtain water in a similar manner, for a precisely

similar purpose, *i. e.*, for transportation and sale. Neither party intends to make use of its land for any other purpose than will facilitate the gathering and distribution of water. In this respect their rights are equal, one as great as the other, and we see no reason why the rule should not be applicable as would apply in case either owner desired to improve its land for purposes of use. Then, as we have seen, neither party would be liable for the diversion of percolating water because each is engaged in the exercise of a legal right, and the rights of each are equal in the use and enjoyment of the land. When both seek to use their land for exactly the same purpose, and neither seeks to improve it for the purpose of beneficial enjoyment, but to make a profit from the business carried on, the right to such use must also be equal. Under such circumstances, if one gets more than the other, we think there can be no more ground of complaint than would exist if both sought to improve their own land and one secured more than the other, or one was damaged and the other not. As applied to such obligations, the doctrine of reasonable use and relative rights has never been adopted by any of the courts in this State, nor in any other State, so far as our research has discovered, except in New Hampshire. We are not able to see, therefore, that the act of the defendant has infringed upon any legal right which the plaintiff possessed. So far as the diversion of the small brook is concerned, we do not think that the facts warrant its separation from the rule applicable to percolating water. There was little proof to show that its source, character or use was such as to make the rule of the Smith case applicable. It is not every rivulet or small stream to which such rule can be applied, as it is evident, if such were the rule, then an adjoining owner might be unable to improve his property, or might improve and find himself liable for exercising his legal right. The destruction must be unreasonable when the rights of both parties are considered, and, as applied here, we think it was not sufficient to create a subject matter of legal damage."

This rule reiterated in the Merrick Water case, and for which we contend has been applied by the Courts in a number of States.

In

*Stillwater v. Farmer*, 89 Minn., 67 ; 93 N. W., 907, the plaintiff water company brought suit to restrain the defendant from interfering with percolating waters and destroying the flow to plaintiff's spring where such interference was solely in furtherance of a malicious desire on the part of the defendant to waste the water to the injury of the plaintiff. The plaintiff was collecting the water and selling it in a neighboring city and its inhabitants for domestic use. The defendant had judgment below dismissing the complaint for failure to state a cause of action, which on appeal to the Supreme Court of Minnesota was reversed. The Supreme Court, after citing with approval *Pixley v. Clark*, 35 N. Y., 520, and *Frazer v. Brown*, 12 Ohio St., 294, said :

" If the collection of these waters was essential and necessary that defendant might use them for any reasonable purpose, or, even if, from the evidence, it could be found that he was competing with the plaintiff, \* \* \* then there would be very little doubt as to the rule to be applied, and of the correctness of the conclusion reached by the Court below."

See, also,

*Greenleaf v. Francis*, 18 Pick. (Mass.), 117.  
*Ocean Grove Assn. v. Asbury Park Com.*, 40 N. J. Eq., 447.  
*Southern Pac. R. R. Co. v. Dufour*, 95 Cal., 615.  
*Fraser v. Brown*, 12 Ohio St., 294.  
*Haldeman v. Bruckhardt*, 45 Penn., 514.  
*Whatley v. Bough*, 25 Penn st., 528.  
*Davis v. Spalding*, 157 Mass., 431.  
*Brown v. Illins*, 27 Conn., 34.  
*Goodale v. Tuttle*, 29 N. Y., 459.  
*Phelps v. Nowlen*, 72 N. Y., 40.  
*Van Wycklen v. City of Brooklyn*, 118 N. Y., 424.  
*Ellis v. Duncan*, 21 Barb., 230.

The principle which underlies all these decisions is this : the law does not recognize in the owner of land any legal right



over the lands of others to subordinate such lands to the burden of an easement thereon in his favor that underground waters shall be permitted to percolate therein simply to benefit his land or his enjoyment thereof.

The land owner acquires no legal rights in percolating waters until they have actually entered his soil and then his legal rights therein arise from the fact that the percolating waters so entering his own soil are a part of his own land while there.

The rule is to be deduced from the authorities as to percolating waters is that the owner of lands owns the percolating water in the soil by the same title upon which he holds the land. He may make such use of the percolating water therein, as he chooses and is not liable for the interception of percolating water, even though it cuts off the supply of the adjoining owner, unless one owner uses his lands solely to obtain water from adjoining premises for purposes of transportation and sale. But the rule seems to be thoroughly settled that no liability attaches as in this case where all parties are engaged in the use of their land for the purpose of extracting percolating water therefrom to transport and sell the same, or its constituents, to others. Their rights as between themselves are equal and no action lies, although one may obtain more water from the same territory than the other.

The same rule has been held to apply to petroleum, oil and natural gas.

*Brown v. Spilman*, 155 U. S., 665, pp. 669-70.

“ Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown v.*

Vandergrift, 80 Penn. St. 142, 147; Westmoreland Nat. Gas Co.'s Appeal 25 Weekly Notes of Cases (Penn.) 103."

In *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep., 545,

an Oklahoma statute, enacted ostensibly for the purpose of regulating the laying of pipe lines for the transporting of natural gas and for the restricting of the pressure in such pipe lines, but in reality for the purpose of preventing the transportation and sale of natural gas beyond the confines of the State—was recently (1909) declared unconstitutional and void by the Circuit Court for the Eastern District of Oklahoma as in effect depriving persons of property without due process of law and denying the equal protection of the laws. The Court there said (pp. 563, 564):

"The rule of property right in natural gas and oil in all the states save Indiana is stated by Mr. Justice SHIRAS in *Brown v. Spilman*, 155 U. S., 665.

"The rule adopted by the courts of Indiana is this: The owner of the fee of oil or gas bearing lands does not have an absolute ownership in the oil or gas in place in the land, but a qualified ownership only, capable, however, of being made absolute by reduction to possession.

"However, as has been stated, which of the two is the better rule of decision, and the one which should be adopted as controlling property rights in this class of property in this state, we deem it neither necessary nor proper to here determine; for it is clear, even if the Indiana rule should be adopted, the contention made by defendants that there exists in the people of the state, in the natural gas found within the state, such a common ownership as the state may control and protect for the benefit of the whole people, as it may the wild game of the state, the common air, the flowing streams, etc., must be denied, for this precise point was ruled in clear and forceful language by the Supreme Court, Mr. Justice WHITE delivering the opinion, in *Ohio Oil Company v. Indiana*, 177 U. S., 190."

"From all of which it becomes apparent the contention of defendants that the natural gas found within the territorial limits of the state is the common heritage of the people of the state, which may be conserved and preserved by the state as trustee of those things in which the people have a common interest, as flowing streams, wild animal life, etc., is unsound and must be denied. On the contrary, it must be held he who by lawful right reduces to his possession mineral, gas, or oil has the same absolute right of property therein, with the same power of barter, sale, or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the state employ, as the farmer has of his corn, his wheat, or his stock, or the merchant of his wares, and such absolute right therein as the state cannot deny him without making just compensation, and any attempt to so do would be in violation of the fourteenth amendment to the federal Constitution."

In

Westmoreland Nat. Gas. Co. v. DeWitt, 130 Penn. St., 235, 249, 250,

the Court said :

"Gas, it is true, is a mineral, but it is a mineral with peculiar attributes which require the application of precedence arising out of ordinary mineral rights with much more careful consideration of the principles involved than of the mere decisions ; water is also a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedence in regard to flowing or even to percolating waters. Water and oil, and still more strongly, gas may be classed by themselves if the analogy be not too fanciful as minerals *feræ naturæ*. \* \* \* They belong to the owner of the land and are part of it so long as they are on or in, and are subject to his control ; but when they escape and go into another's land

or come under another's control the title of the former owner is gone. \* \* \* If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control it is no longer yours, but his."

The same has been held in Indiana :

Peoples Gas Co. v. Tyner, 131 Ind., 277 ; 31 N. E., 59.

Simpson v. Pittsburgh Plate Glass Co., 28 Ind. Appeal, 352 ; 62 N. E., 753.

In Kentucky :

Commonwealth v. Trent, 117 Ky., 46 ; 77 S. W., 390.

In California :

Acme Oil & Mining Co. v. Williams, 140 Cal., 681 ; 74 Pac., 296.

In West Virginia :

Preston v. White, 57 W. Va., 284 ; 50 S. E., 236.

In Kansas :

Lanyon Zinc Co. v. Freeman, 68 Kans., 696 ; 75 Pac., 995.

And in Federal Courts,

Federal Oil Co. v. Western Oil Co., 121 Fed. Rep., 675, 676.

Brewster v. Lanyon Zinc Co., 140 Fed. Rep., 801, at 809.

Ohio Oil Co. v. Indiana, 177 U. S., 190, at 208.

The foregoing cases establish that the taking of percolating water by a land owner is in the exercise of a legal right which is without restriction or limitation, except in the one instance. Our first contention, therefore, is that this statute which forbids the owner of the land from exercising that legal right takes property without due process of law and without compensation, and is necessarily unconstitutional and void.

The statute is claimed to be enacted to prevent waste. Its title which reads :

“ An act for the Protection of the Natural Mineral Springs of the State and to Prevent Waste and Impairment of its Natural Mineral Waters,”

would seemingly indicate that it was an innocent and fair enactment designed to prevent waste. Actually no such purpose exists. The statute is a most vicious form of class legislation, enacted for private purposes in general and in particular for the purpose of “ putting out of business ” the defendant Gas Company and the three other Gas Companies in Saratoga, which are the only producers of natural carbonic acid gas in the State. The public if this statute is enforced will be unable to secure natural gas, the carbonating and charging of table waters, soda water, etc., with natural gas, will no longer be possible, the manufacturers of carbonic acid gas will have a clear field and the vendors of mineral water will have no competition in Saratoga Springs, because these companies will be ruined, being unable to live or earn sufficient revenue from the water business alone.

The statute is said to contain four provisions, three of which have been held by the State Courts to be unconstitutional. In this discussion we will consider only the one provision which is held by the Court of Appeals to be Constitutional.

The statute was passed upon by the Court of Appeals in  
Hathorn v. Natural Carbonic Gas Company, 194 N.  
Y., 326,

upon an appeal from an order granting a temporary injunction restraining the defendant from pumping its wells and considered by that Court upon a state of facts, alleged in the complaint and admitted by demurrer, entirely contrary to the facts alleged in the amended bill herein.

Mr. Justice HISCOCK, who wrote the prevailing opinion, states the prohibition of the Act (p. 341), as follows :

“ As already stated, these prohibitions are four in number, and in effect they respectively forbid accelerating or increasing the flow of percolating waters or

natural carbonic acid gas, such as are found at Saratoga Springs from wells bored into the rock by pumping or any artificial contrivances whatsoever; *first*, absolutely and without qualifications; *second*, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; *third*, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same, and, *fourth*, prohibit the doing of any act whereby the flow or quality of the waters described or of the carbonic acid gas or other mineral ingredients therein in any spring or well is diminished, etc."

He then continues (pp. 341 and 342):

"It was substantially admitted by the respondents that the last prohibition was so broad and unqualified as to be unconstitutional and inoperative, and that, therefore, may be eliminated from our consideration.

"When these rules are applied it seems to me that the first two prohibitions of the statute must be condemned and the third one upheld.

"The former not only prohibits pumping waters and gas described where the result will be to interfere with the spring of another person, but forbid such acts absolutely, even though they interfere with nobody. Their application is not limited to waste or commercial uses, but under them as they are plainly and explicitly written, a land owner in any part of the state is prohibited from extracting by means of the simplest and most modest contrivance waters from a well bored on his premises for the most legitimate and natural purpose connected with the use of his premises, provided the well happens to strike rock, and provided the water contains mineral salts and carbonic acid gas, and this whether such act interferes or not in an infinitesimal degree with the supply of some other person. It seems to me that this is such a clearly unlawful interference with well-established property rights already discussed that amplification of the idea is unnecessary.

"Of course the principle is not overlooked that the presumption is in favor of the legislative act, although it must be admitted that this presumption is somewhat weakened at this point by the common concession that at least one unconstitutional prohibition has been incorporated into this statute."

It will be noticed, however, that in stating the prohibitions of the Act, Mr. Justice HISCOCK fell into a serious error in holding that the third prohibition forbids accelerating or increasing the flow of percolating waters or gas, or forbids any waste or impairment.

Such prohibition reads (Record, p. 11, fol. 20) :

"Pumping, or otherwise drawing by artificial appliance from any well made by boring or drilling into rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of, carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful."

It will be observed from an examination of this prohibition that it forbids two things :

- (1) Pumping or otherwise drawing the mineral waters by artificial appliances from wells drilled into the rock, for the purpose of extracting and vending the gas separate from the water ; and
- (2) Pumping or by any artificial contrivance, producing an unnatural flow of gas from wells drilled into the rock for the purpose of marketing the same.

Nowhere in this provision is there any reference to acceleration of mineral water ; nowhere is there any prohibition against forcing or increasing the flow of mineral water, nor is it any where contemplated therein that the waste or impairment of either mineral water or gas should be prevented.

The statute in express terms prohibits pumping the particular class of mineral water for the purpose of extracting and vending the gas and prohibits accelerating or increasing the flow of gas for the purpose of marketing it. Can it be said as a matter of law or of fact that the marketing of gas obtained from wells drilled into the rock, or obtained from water secured from wells drilled into the rock, is in itself a waste that can be prohibited by this kind of legislation?

Can it properly be said that the use of artificial appliances in the exercise of a legal right can be declared unlawful or improper under any circumstances and particularly under the facts here set forth?

Can it be that the purpose for which the water or gas is obtained is the sole factor to be considered in determining whether or not the land owner has a right to mine minerals beneath the surface?

There is no provision against pumping or accelerating the flow of the water or gas other than that against marketing the gas separate from the water, and no claim is made that the statute can be enforced against any other industry than that of the producing and selling of the gas.

The allegations of the amended bill (Record, pp. 9, 10) show that through and under the lands owned by the defendant Gas Company in the Village of Saratoga Springs, are percolating mineral waters of the character described in the Act, which do not flow naturally to or upon the surface, and which cannot be reached or brought to the surface for use without the use of pumps or other artificial appliances, and that in order to obtain the water and gas the defendant Gas Company has sunk wells upon its property, which are bored or drilled into the rock, and which are fitted with tubing and seals and lift pumps, by means of which it reduces the water and gas to possession; that such lift pumps do not suck the gas or water from the land or exercise any pervasive force therein, or exercise any force of compulsion upon water in or under adjoining lands, but lift only to the surface such water and gas as flow by the laws of nature into the wells so made upon its property; that no process is used to separate the gas from the water, but only as much gas is used as escapes naturally from the water and no part of said gas is wasted or permitted to escape, but all is caught and used, and



all the water for which there is any market or demand is bottled and sold.

These allegations admitted by the demurrers show only a reasonable use by the defendant Gas Company of its property and a use which no Court has ever attempted to show could be prevented.

It cannot be claimed that any other property owner in Saratoga Springs has any superior right over this Gas Company or any other property owner in Saratoga to the mineral waters that are percolating through the soil.

No claim is made or can be made that the appellee Hathorn or any other property owner in Saratoga Springs is collecting and using this water for purposes of agriculture or in the beneficial use and enjoyment of the land. The water and gas are alike destructive of vegetation and have no qualities that permit their being applied to any use which land as land may serve. It cannot be used even for washing purposes or in boilers of a manufacturing plant.

In

Lindsley v. Natural Carbonic Gas Co., 162 Fed.  
Rep., 954, 959,

it was said :

" It is to be noted that oil and gas are of no value to the land as land, and have no value for any purpose when united. One surface owner may want oil, and another gas, or, if one wants both, he must use them separately. The statute of Indiana protected owners who wanted gas from the unnecessary waste of it by owners who wanted oil ; but gaseous spring water, though of no value to the land as land, has a value in itself, and the interests of the surface owners are either in the naturally charged water or in the gas alone. The statute of New York protects the surface owner who wishes the charged water against the owner who wishes only the gas. The Forbell Case seems to treat the use of percolating water as an adjunct of the land as the primary use to be preferred to and protected against the secondary use as a commodity apart from the land. Here, again, the gaseous water differ from ordinary water, in that its value lies, not in its use for the land

as land, but in its use as a health-giving beverage when drunk on the land or bottled and sold as a commodity for use elsewhere."

The owners of mineral water in Saratoga all secure their water through the use of artificial appliances, most of them with the aid of pumps, and, having secured it, either sell it over the counter to their customers at a stated price per drink, or bottle it and ship and sell it to their customers both in and out of Saratoga and the State of New York.

In the history of Saratoga Springs the water has never been used for any other than commercial purposes, and as a source of revenue which had no relation to the beneficial use and enjoyment of the land as land.

For instance, the Court of Appeals, in

Hathorn v. Natural Carbonic Gas Company, *supra*, states, page 329 :

" that plaintiffs during many years have been engaged in bottling and marketing the products of said spring, incurring great expense therein and deriving great profit therefrom."

What right, then, has the State of New York to decree that we shall not pump the water or use other artificial appliances to procure the same, where our purpose is the sale of the gas separate from the water, while the Hathorns and other persons are permitted to pump the water and use any artificial appliances they choose to secure the same, where their purpose is to sell the water separate from the gas and not sell the gas?

On the one hand we vend all the gas separate from the water, bottle and sell part of the water, and return the balance to the earth, into which it again percolates.

The mineral water industries on the other hand having collected by means of pumps and other artificial appliances the water containing gas, bottle and sell the water, first carbonating it with gas obtained from some natural Gas Company in Saratoga or with artificial gas purchased elsewhere, the gas coming out of the water when brought to the surface being allowed to escape by them or being used for other purposes. In every case the water must be carbonated and cannot be

bottled and sold as it comes from the ground, but absolutely requires the use of additional gas, either natural or artificial.

Where then do the rights of the land owners differ? It cannot be said that the man who sells mineral water without the gas is in a position to complain of the man who sells the gas without the water. Certainly it cannot be that because the gas business affords a larger field, and this Gas Company is doing a larger business and making more money than the mineral water industries, that that in itself affords any basis for legislation. The fact that we require in our business and are using more water and gas than the mineral water vendors, certainly is beside the question.

There is no common property in which the owners of lands in Saratoga have a common interest for the waters, as alleged in the amended bill (Record, p. 9), are percolating waters only and in that respect differ entirely from deposits of illuminating gas, petroleum and oil. The decisions relating to oil and illuminating gas, and the statutes passed with respect thereto, form, therefore, no absolute criterion for decision in this case, although such decisions in many of the States in regard to oil and illuminating gas are particularly interesting and instructive, for they indicate clearly that even under the doctrines there applicable this statute would be absolutely and completely condemned.

They recognize a property right in the owner of the land to mine and collect the minerals found beneath the surface, even though, like water, oil and gas, they have no fixed *situs*. In upholding that right, which has no relation to the purpose for which the mining is made, except in the case where the sole purpose is waste, they unqualifiedly affirm that the use of artificial appliances in the mining cannot be restricted, nor can the owner be limited in the amount that he may obtain of the common product.

In

Calor Oil & Gas Co. v. Franzell, 109 S. W., 328 (Ky.),

the Court said (p. 331):

"We have already held, in the cases of Commonwealth v. Trent, etc., 117 Ky., 34, 77 S. W., 390, and Calor Oil & Gas Co. v. McGehee, 117 Ky., 71, 77 S.

W., 368, that one who illegitimately wastes or destroys the gas of a district may be punished under the criminal statutes of the state and may also be enjoined from committing such wrongful acts; but all parties owning gas wells in the district are free to make any legitimate use of the gas they choose, and the fact that this legitimate use tends to exhaust the supply gives the other owners of gas wells in the district no just ground of complaint. The court knows, as a part of the history of the country, that natural gas districts after flourishing for a while are frequently entirely exhausted, and that manufacturing and power plants established in the district, and dependent upon the use of the gas for fuel, are forced to move elsewhere. This may happen to the district under consideration; but, as said before, if this results from legitimate sales by the various owners to their customers, no one of them has a just ground of complaint. They have all enjoyed the property while it existed, and when it is exhausted they, of course, can no longer enjoy it."

In

People's Gas Co. v. Tyner, 131 Ind., 277, 31 N. E. 59, it was sought to enjoin the Gas Company from exploding nitroglycerin in its wells to increase the flow of gas. The Court granted the injunction upon the ground that it would be dangerous to property and lives to permit the exploding of nitroglycerin in the thickly populated districts wherein the Gas Company's property was situated, but held that aside from such endangering of life and property, the owner was entitled to increase the flow by any means he saw fit:

"It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land, and draw therefrom all the gas that may naturally flow to it, but he contends that they have no right to explode nitroglycerin in the well to increase the natural flow. When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well

by the explosion of nitroglycerin therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take gas at all."

In

Acme Oil & Mining Co. v. Williams, 140 Cal.,  
681-4, 74 Pac., 296,

it is stated in regard to the pumping of oil

"when a well is developed the oil may be tributary to it for a long distance through the strata which holds it. This flow is not inexhaustible, no certain control over it can be exercised, and its actual possession can only be obtained, as against others in the same field, engaged in the same enterprise, by diligent and continuous pumping. It is anybody's property who can acquire the surface right to bore for it, and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increased in proportion as his neighbor similarly situated neglects his opportunity."

In

Commonwealth v. Trent, 117 Ky., 46; 77 S. W., 390, the Court of Appeals of Kentucky, in upholding the constitutionality of a statute preventing waste of natural gas, nevertheless upheld the right of the defendant to make any proper use of the gas that he should desire, saying :

"The defendants had the right to use the gas in any sort of lawful business done or attempted to be done in good faith."

The case of

Richmond Natural Gas Co. v. Enterprise Natural  
Gas Co., 31 Ind. App., 231; 66 N. E., 782,

is peculiarly interesting. In that case the Court upheld a statute authorizing an injunction to restrain the use of any device for pumping natural gas, or any other artificial process or appliance having the effect to increase the natural flow

from any well not to be violated by the use of pumps to a degree not destroying the back pressure and so not creating a suction in the wells, saying :

"An artesian well from which flows 1,000 barrels of water daily has a natural flow of 1,000 barrels daily. And so it is with gas wells. Increasing this natural flow of gas or this total output of the wells from natural causes is the thing that is prohibited, and so long as the appliances take less than this natural flow, as thus understood, it cannot be said that they have increased the natural flow. Upon the facts found, all the gas that goes into the pumps on the intake side goes in by reason of its own expansive force or tension. This expansive force or tension must necessarily exist so long as back pressure is maintained at the pumps. The court finds that this back pressure was to be maintained at all times by appellant in the operation of its pumps and compressors, and that at no time has it been or is it appellant's intention to permit the entire natural flow from its wells to be taken by the pumps. Unless the pumps were so operated as to entirely remove this back pressure and create suction in the wells, it could not be said that they would increase the natural flow or natural output of the wells. From the facts found, the only effect of the use of the pumps is to decrease the force of this back pressure, but this the statute does not prohibit. It is true that through the use of the pumps a greater portion of the natural flow or total natural output of the wells will be taken than would be taken without their use, and that the back pressure in the wells will be correspondingly decreased. But the statute does not require that only a certain portion of the gas coming naturally from a well can be used, and that a certain portion shall be held back. Nor does the statute require that a certain amount of back pressure, or that any back pressure, shall be maintained."

Jones v. Oil Company, 194 Penn. St. 379, 382, 383,  
44 Atl. Rep., 1074, 1075.

"If it is lawful to take a water from a substrata by the exercise of all the skill and invention of which man is capable, we see no reason why it is not lawful to produce oil by these means."

See, also,

Townsend v. State, 147 Ind., 624.

Ohio Oil Co. v. Indiana, 177 U. S., 190.

A different question might be presented if the statute prohibited pumping the water and wasting the gas or wasting the water thus requiring owners to conserve all its constituents and utilize all its parts, but here no matter what use is to be made of the water if the gas is to be sold the owner may not pump. And again no matter how small the pump, no matter what the character of the artificial appliances or how small a quantity of water or gas is obtained the defendant must cease.

The Court of Appeals sought to evade these manifest objections by reading into the statute limitations that do not exist therein, so that the statute would seem to provide only against acceleration, injury and waste. Legislation of this kind by the Court while interesting is nevertheless very unsatisfactory.

The statute is absolutely prohibitory in its terms and is not conditioned upon either waste or injury to others and the Court is powerless to read into its lines conditions that do not exist.

The only acceleration forbidden by the remaining provision of the statute is the acceleration of gas from wells drilled into the rock where the purpose is the sale of the gas and where the acceleration is caused by the use of pumps or other artificial appliances. This refers to the free gas (usually called dry gas,) that is obtained without the necessity of pumping any water.

As a matter of fact there is no dry gas in the rock and the wells from which it is obtained do not go into the rock. The water is found percolating through the rock and the gas is absorbed by the water and held in solution under the ordinary hydrostatic pressure that is common to all percolating waters. Where breaks occur in the rock the pressure will be relieved and the gas and water escape to the surface above the rock.

Ofttimes the gas will become trapped under impervious clay beds which are generally found in this section above the rock. A hole drilled into the clay will give access to the gas so trapped and furnish the ordinary dry gas well. Of course if the fissure in the rock can be located as is sometimes done—notably the Hathorn Spring—a direct connection can be established with the water into the rock and the water pumped out without actually drilling in the rock. This presents, of course, the question of classification raised under another point of our brief.

Assuming, however, that the statute does provide against acceleration, it must nevertheless be bad for water cannot be pumped without accelerating the flow whether we use suction pumps, lift pumps, a chain pump or a bucket with a rope or the old-fashioned well sweep. It is all pumping and they all cause acceleration. The moment you displace a bucket of water, by letting the bucket down and lifting it out full of water, the water taken out is replaced by water rushing in and to the same extent the flow of water and gas into the hole is accelerated to take the place of the water removed. And this is prohibited not only where it injures another, or affects the flow under another's land, but in every case whatsoever. The owner of a mineral spring upon his property, which does not flow to the surface is thus prohibited from making any use of it and from in any way acquiring the water.

It is said that no such result is intended by this act and that this is an unreasonable view of its terms, and that no one will seek to prevent such pumping.

The statute standing as the law makes any one violating its provisions liable when complained of whether by one fair minded or with a grudge to gratify. The language is "pumping or otherwise drawing by artificial appliance mineral water or pumping or by any artificial contrivances whatsoever in any manner producing an unnatural flow of natural carbonic acid gas." All pumping is prohibited, all artificial appliances are prohibited, and all acceleration is forbidden.

Every act must be judged, not by what is being done under it, but by what may be done under its terms.

*Mugler v. Kansas*, 123 U. S., 623, 661.

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at



liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.”

*Lawton v. Steele*, 152 U. S., 133-137.

*Yick Wo v. Hopkins*, 118 U. S., 356, 373-4.

*Stuart v. Palmer*, 74 N. Y., 183-8.

*Gilman v. Tucker*, 128 N. Y., 190-200.

*Coxe v. State*, 144 N. Y., 396-408.

*Colon v. Lisk*, 153 N. Y., 188, 194-5.

*Kansas Gas Co. v. Haskell*, 172 Fed., 545-557-571.

The absurdity of this statute and its unreasonableness was well illustrated in some of the cases now pending to secure its enforcement. In those cases in September, 1909, final judgments were granted, restraining, in the language of the provision aforesaid, the defendants from pumping for the purpose of vending the gas separate from the water. Pending an appeal to the Court of Appeals where reversals were had,

*People v. Gas Co.*, 196 N. Y., 421,

several of the defendants for the purpose of keeping their wells clear and the dead water out disconnected the separator pipe from the well and continued pumping, allowing the water with the gas in it to flow out on the ground or to run off with the sewage. Many estimable Saratoga citizens cried out against this outrage, but alas it was discovered too late that the statute and the judgment enforcing it prohibited only the use of the gas and not its waste. And lest the Court think the defendants actuated by petty spite (the motive actuating the exercise of a legal right cannot, however, serve to limit the right) in such pumping, we affirm now that such was not the case. Were the wells allowed to remain idle pending the delay incident to relief on appeal, the wells would fill up with dead water and an additional period of pumping would be required before the dead water could be removed and wells again producing up to their normal capacity. The defendants acting well within the law were saving themselves against loss as best they could.

When a statute creates such a state of facts need anything more be said as to its unreasonableness and, if unreasonable, can it be said to be valid and constitutional? The foregoing decisions establish that the Gas Company has a right to col-

lect the percolating waters in its land and make such disposition thereof as it chooses, and that such right is a property right, of which it cannot be deprived by any arbitrary or unreasonable legislation nor without due process of law and compensation.

### **Due Process of Law.**

Due process of law undoubtedly means in the due course of legal proceedings according to the rules and policies which have been established for the protection of private rights.

The act here challenged does not itself furnish such due process of law, as satisfies the constitutional limitation.

In

Chicago, etc., R. R. Co. v. Chicago, 166 U. S., 226,  
at 241,

the Court said :

" In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

And so here it is the law itself, which deprives the defendant of its property and not the judgment of a Court of competent jurisdiction. True, the facts which constitute a violation of the act must be established in a judicial proceeding, to which the owner is a party, but when that fact is judicially determined, the law itself deprives the party of the beneficial use and enjoyment of his property. We have already shown that at common law the owner of lands owns the percolating waters and natural gases in the soil, upon the same title upon which he holds the land, and that he is not liable for the interception of such waters and gases. This right is a vested one,

and, therefore, the principle announced in the authorities apply.

Twining v. New Jersey, 211 U. S., 78, 100, 101.

Missouri Pacific Ry. Co. v. Humes, 115 U. S., 512, 519.

Hurtado v. California, 110 U. S., 516.

Scott v. McNeal, 154 U. S., 34, 46, 50.

Smyth v. Ames, 169 U. S., 466-522 to 526.

Although the statute in question does not take the property of the defendant and appropriate it to a public use, it does effectually deprive it of the beneficial use and enjoyment of the property, not only without due process of law, but without any pretence of compensation. It is not simply physical property, which is intended by the inhibition of the Constitution and which may not be taken away without compensation or due process of law. Property does not consist alone in something that is tangible, but the right to use is as much property as the land itself.

Allgeyer v. Louisiana, 165 U. S., 578, at 589.

Chicago etc. R. R. Co. v. Minnesota, 134 U. S., 418, at 458 ;

Muhlker v. R. R. Co. 197 U. S., 544.

Westervelt v. Gregg, 12 N. Y., 202, 209 ;

Forster v. Scott, 136 N. Y., 577, 584.

“The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever

deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it effects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even those powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny."

### **Police Power.**

Whenever any statute of doubtful validity is sought to be sustained, its supporters will always contend that it is a proper exercise of the police power of the State. It must be borne in mind, however, that the police power cannot set up contrary to the express inhibitions to the Federal and State constitutions. The Courts have held that powers that can only be justified on the specific ground that they are police regulations, and which otherwise would be clearly within the prohibitions of the constitution, can be only such as are clearly necessary to the safety, comfort and welfare of society, and are so clearly and imperatively required by public necessity as to lead to the rational and satisfactory conclusion that the supporters of the constitution could not as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding that the language of the prohibition would otherwise include it.

If, then, it is absolutely necessary to the welfare, or health, or safety, or morals of the public in general that the pumping of waters containing carbonic acid gas should be stopped, this Act might be called a valid exercise of the police power of the state. On the other hand, unless such absolute necessity exists for such prohibition, the police power of the State cannot be exercised to prevent the doing of these acts, legal in

themselves, which are not a cause of injury to any persons or to the State, and which are but the exercise of a lawful right of ownership of property.

See *Colon v. Lisk*, 153 N. Y., 188, where the Court, at page 196, referring to the police power, said :

“ Although it includes everything essential to the safety, health, morals and general good of the public, it is by no means unlimited. ‘To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference ; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts’.”

When it is sought to exercise the police power in the direction of so regulating the use of private property or so restraining personal action as to secure or tend to the welfare or happiness of the community, no constitutional guarantee is violated and the legislative authority is not transcended ; but, nevertheless, the legislation must have some relation to these ends, for in the mere guise of police regulations private property and personal rights cannot be arbitrarily invaded.

The police power only begins where the Constitution ends, and when its exercise encroaches upon vested constitutional rights, Courts should not be concerned with the probable purposes for which it is exercised, or the evils which it was designed to correct.

One of the first requirements of legislation defended under this power is that it must be reasonable, must be moderate, and have proportion in its means to the end sought to be reached.

In

*Plessy v. Ferguson*, 163 U. S., 537, 550,  
this Court, answering a suggestion as to how this power might  
be carried out, said :

“ The reply to all this is that every exercise of the  
police power must be reasonable, and extend only to  
such laws as are enacted in good faith for the promo-  
tion of the public good, and not for the annoyance or  
oppression of a particular class.”

The power must be exercised subject to the provisions of  
both the Federal and State constitutions, and the laws passed  
in the exercise of such power must tend in a degree that is  
perceptible and clear toward the lines of health or morals or  
the welfare of the community, as those words have been con-  
strued and used in many cases.

*Mugler v. Kansas*, 123 U. S., 623, 661.

*Lawton v. Steele*, 152 U. S., 133, 137.

*Wright v. Hart*, 182 N. Y., 330, 341.

*Fisher v. Woods*, 187 N. Y., 90, 94.

*Health Dept. v. Rector*, 145 N. Y., 32, 39.

In

*Mugler v. Kansas*, *supra*,  
this Court, in considering and holding valid a statute of the  
State of Kansas prohibiting the manufacture and sale within  
the State of spiritous liquors, in discussing the police power,  
said :

“ It belongs to that department to exert what are  
known as the police powers of the State, and to deter-  
mine, primarily, what measures are appropriate or  
needful for the protection of the public morals, the  
public health, or the public safety.

“ It does not at all follow that every statute enacted  
ostensibly for the promotion of these ends, is to be ac-  
cepted as a legitimate exertion of the police powers of  
the State. There are, of necessity, limits beyond which  
legislation cannot rightfully go. While every possible  
presumption is to be indulged in favor of the validity of

a statute, *Sinking Fund Cases*, 99 U. S., 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In

*Fisher v. Woods*, 187 N. Y., 90, 94, the New York Court of Appeals declared unconstitutional a section of the penal code, which made a misdemeanor the offering of real property for sale in cities of the first and second class without written authority, the Court there, saying (pp. 94, 95):

"The constitutionality of this act depends upon the question whether it was a valid exercise, on the part of the legislature, of the police powers of the state. The rules which should control us in the determination of this question appear to be well established by the authorities. The power must be exercised subject to the provisions of both the Federal and State Constitutions,

and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety or the lives, health and morals of our inhabitants or the welfare of the community. But the legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution nor prevent him from adopting and following any lawful profession, trade or industrial pursuit not injurious to the community that he may see fit; nor prevent him from making contracts with reference thereto. To justify the state in interposing its authority in behalf of the public, it must appear that the interest of the public generally, as distinguished from those of a particular class, require such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation (*Health Department v. Rector, etc.*, 145 N. Y., 32; *People v. Gillson*, 109 N. Y., 389; *Colon v. Lisk*, 153 N. Y., 188; *Lawton v. Steele*, 152 U. S., 133; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y., 116; *Stuart v. Palmer*, 74 N. Y., 183; *Gilman v. Tucker*, 128 N. Y., 190, 200, and authorities in each case cited)."

No authority can be found anywhere for the proposition that this statute was enacted for the public benefit. Neither



the State nor the public can appropriate any of the gases or the waters containing such gases upon or under the lands of this Company, nor has the public or the State any interest therein, and if that be true, then the State has absolutely no power to enact a law depriving this Company of the right to use its own property in a lawful manner, as others are permitted to use their property. In this case neither the property of the defendant nor its business is in any proper sense devoted to a public use. The business carried on by the defendant corporation is wholly private and conducted upon its own premises. The conduct of its business is no different in that sense from the conduct of a department store, or any other private business.

By the statute in question the legislature has undertaken to loan the power of the State for the benefit of the Hathorns and other property owners similarly situated, thus assuming a parental care of private property owners, in which the public has and can have no interest. It is asserted that this mineral water possesses medicinal qualities and is of beneficial value to the public, because of certain health-giving qualities, but that does not mean that there is such general public interest in the preservation of the water and its medicinal qualities as to justify the exercise of the police power of the State. The legislation under the police power can only extend to the appropriation of such things as menace the public health or as reasonably promote the general health and not to every means that may make the health of certain individuals better. It is no part of the duty of the State to distribute medicine, whether in the form of water or pills.

Assuming the power of the State to extend to the preservation of these mineral waters, how are the People to obtain them for medicinal or other purposes? Certainly, the State cannot compel the owners of the lands, wherein the water is found, to produce it and sell or give it to the people, and if the owners refuse to produce and sell the water or gas, no law can compel them to do otherwise.

The test always is not what is, but what may be done under a law and where the result may operate to absolutely exclude the people, from participation either in the business, or to the products of the business, it cannot be said that its enforcement

operates to accomplish any of the purposes which the exercise of the police power is designed to accomplish.

That the business conducted by this defendant is purely private and not affected by public interest, most clearly appears, for it may contract for its product, or not, as it sees fit.

The purpose of the Act is a purely private and selfish one, namely to deprive the owners of wells which are bored or sunk into the rock of their property, and business for the benefit of owners of wells which are not sunk or drilled into the rock, and to legislate out of existence the natural gas industry.

As was said by PECKHAM, J., in

*People v. Gillson*, 109 N. Y., 389, 399,  
this statute "is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."

Discussing the scope of the police power in that case, Judge PECKHAM said, among other things (p. 401):

"Under an exercise of the police power the enactment must have reference to the comfort, the safety, or the welfare of society, and it must not be in conflict with the Constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation. \* \* \* It is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above

mentioned. Unless such relation exist the enactment cannot be upheld as an exercise of the police power."

In

Wright v. Hart, 182 N. Y., 330, 344,  
it was said :

" It cannot be reiterated to often that the police power must be exercised within its proper sphere, and by appropriate methods. Whenever a statute arbitrarily strikes down private rights, invades personal freedom or confiscates or destroys private property, it is repugnant to the Constitution and should not be permitted to stand, no matter how laudable its purpose or beneficial its effect."

In

Huber v. Merkel, 117 Wis., 355 ; 62 L. R. A., 539, hereinbefore cited upon the question of common law right in subterranean waters, it was held that an Act of the legislature of Wisconsin (Laws of 1901, Chapter 354), which provides among other things, that "where there are two or more artesian wells in any vicinity or neighborhood, one or more of which are operated or used by any other person or owner, the person or owner of such well shall use due care and diligence to prevent any loss or waste or unreasonable use of any water therein contained or flowing from the same, as would deprive or unnecessarily diminish the flow of water in any artesian well to the injury of the owner of any other well in the same vicinity or neighborhood" ; and which further provided that "any person who shall needlessly allow or permit any artesian well owned or operated by him, to discharge greater quantities of water than is reasonably necessary for the use of such person, so as to materially diminish the flow of water in any other artesian well in the same vicinity, shall be liable for all damages which the owner of any such other well shall sustain" to be unconstitutional, because it in effect took private property for private use and without compensation, and was not within the police power.

Speaking of the police power, the Court said :

" As the law in question is in no sense a condemnation law, the only question remaining is whether it may

be sustained as a proper exercise of the police power. The police power is a broad and comprehensive power, by which the rights of an individual, both as to his liberty and his enjoyment of property, may be curtailed in the interest of the public welfare, but it is not easy of accurate definition. Where laws which are supposed to be enacted in the exercise of the police power interferes with the citizens' liberty or rights of property, they can only be justified upon the ground that they in some manner secure the comfort, safety or welfare of society. It is on this principle that drainage laws are sustained. *Donnelly v. Decker*, 58 Wis., 461; 17 N. W., 389. And conversely, if it appear from the law itself that its purpose is primarily to benefit private owners, they are condemned. *In re Theresa Drainage District*, 90 Wis., 301, 63 N. W., 288. It must appear that the interests of the public generally require the restriction, and not the interests of private individuals (*State ex rel. v. Kreutzberg*, 114 Wis., 530; 90 N. W., 1098; 58 L. R. A., 748). We find ourselves unable to comprehend how, under these principles, the law in question can be sustained as an exercise of police power. It does not even pretend to conserve any public interest. Upon its face, its purpose is to promote the welfare of one citizen, by preventing his neighbor from using his own property."

The reasoning of the Court in that case, its discussion of the scope of the police power of the State, and its criticism of the Act under consideration, apply forcibly to the Act here in question and lead irresistibly to the conclusion that the New York statute is also invalid.

### **The Act in Question is Unreasonable.**

Freund, in his treatise on police power, says (p. 61):

"The question of unreasonableness usually resolves itself into this; is a regulation carried to the point where it becomes prohibition, destruction, or confiscation."

Tested by this rule, or by any rule laid down by the Courts, the statute in question comes under the condemnation of the law as grossly and indefensibly unreasonable.

The one remaining provision of the statute prohibits absolutely the use of pumps or other artificial contrivances, whatsoever in the securing of the water for the purpose of extracting the gas and vending it separate from the water. The use of so much as a hand-bucket or a bucket let down in the well is forbidden.

Such provision interferes with a lawful and harmless business, when there is no possible reason for doing so. It cannot be said that there is any scarcity of mineral water or gas, actually or threatened. The defendant, and all other Gas Companies and spring owners in Saratoga Springs, are able to secure from their wells more water and gas than is necessary to supply their trade. It is not a matter of public concern who supplies its needs, provided only they are supplied. It is not the province of the legislature to prevent the defendant company here from doing business, in order to let somebody else secure that business. If the public is supplied, there is no public good to be subserved by legislation of this kind. There is no statute anywhere that can serve as a precedent to this vicious legislation. It is claimed that the Act of Indiana that prohibited wells emitting natural gas from remaining uncapped more than two days, the validity of which was sustained by the Supreme Court in

*Indiana v. Ohio Oil Co.*, 177 U. S., 190, upholds this statute, The claim is not correct. That statute was directed, not against any proper means of bringing the oil or gas to the surface, but against its wanton waste. The discussion of the act is given in the Supreme Court report and indicates its purpose. As further indicating the same thing, this Court itself said, in the subsequent case of

*Bacon v. Walker*, 204, U. S., 311, 316, in referring to the statute thus construed in the *Ohio Oil Company* case, "the object of the statute was to prevent the waste of gas." Here the purpose and effect is not to prohibit and prevent waste, but actually to prevent the use for commercial and medicinal purposes. Here the Act prevents both the trade and the use of a boon to humanity. The distinction is striking and vital.

Further, the entire argument there proceeds upon the proposition that all of the product, gas and oil, comes from a common reservoir, which seems to have been conceded (p. 210). No such concession is here made. Any such claim is fiercely challenged. The gas here is continually forming, and neither the water nor the gas comes from any common reservoir. Instances are known where springs within a few feet of each other have been entirely different in their analyzed contents, showing that there is no common supply from which they come, but that their origin is in the percolation through the rock, and the final contents are determined by the character of the immediate neighborhood through which they pass.

The difference between the facts in the Ohio Oil case and those here, are these :

1. There, the product was simply wasted, allowed to escape into the air, doing no one any good ; here, every particle of the gas is conserved and all the water that can be, sold.
2. There, the source admittedly was a common reservoir ; here, it is neither admitted nor true. This product runs in separate veins. The mineral constituents are different. The pressure is different. The source is manifestly separate.
3. There, the product was natural gas used for heat and light, which everyone must have—necessities ; here, the product is not a necessity ; it is a medicine. The great majority of persons never use it, nor need to.
4. There, the supply was limited and was diminishing ; here, there is as large a supply, both of water and gas, as ever.
5. The supply being as great as ever, anyone whose spring had failed or was failing, could, before this act, restore it and protect it by pumping equally with his neighbors or other spring owners.

The Ohio Oil case cannot, therefore, be regarded as at all a controlling precedent here.

In

Townsend v. State, 146 Ind., 624,  
the Court upheld the constitutionality of an Act, declaring that burning natural gas in flambeau lights was a waste thereof and forbid such use. At page 68 the Court says of the statute :

“The act in no way deprives the owner of the full and free use of his property. It restrains him from

wasting the gas to the injury of others—to the injury of the public. It might present a very different and serious question whether the legislature has the power to prevent him from wasting his own property, if by so doing, he in no way injured others.”

This same question is taken up by Judge CULLEN in his opinion in

*People v. Gas Company*, 196 N. Y., 421, at 440, 441, where in referring to the police power, he says :

“ But under that power the legislature cannot require an owner to use his property for the advantage and benefit of others or of the public, or even for his own benefit, nor restrain him from devoting it to such purpose as he sees fit, or even from wasting it, provided such use does not conflict with the rights of others or the public.”

It will be noticed that Judge CULLEN states that he concurred in the affirmance of the judgment in the Hathorn case, because he thought on the facts alleged in the complaint in that case, that the defendant's use of the water was unreasonable within the doctrine of the Forbell case, and that he concurred in the upholding of the statute, because he deemed it an adjustment of conflicting private rights and the apportionment of a common property among the several owners.

He further states, page 442 :

“ If, however, the fact is that the source of supply from which the defendant draws water is not a common one, but exclusively on its own land, or if its appropriation of the water in no way affects the supply of water on other lands, then the statute has no application.”

The difficulty encountered by the Court of Appeals in the Hathorn case, and which led them in the mistake of applying or attempting to apply the doctrine of the Forbell case to this statute, was due to the fact that the complaint there, while alleging that the waters were percolating, alleged also that they had a common source, such allegations being admitted by the

defendant's demurrer. Here, it is alleged that the waters are percolating waters only, which does not admit of any assumption or claim that the waters come from any underground stream or channel, or any common reservoir or source, except the source that is common to all percolating waters—the rainfall.

Howard v. Perrin, 200 U. S., 71, 75.

Barclay v. Abraham, 120 Iowa, 630, 96 N. W., 1080.

When, however, the statute was again before the Court of Appeals in

*People v. Gas Co., supra,*

upon a complaint identical with the complaint in the Hathorn case and upon an answer of the defendant identical with the bill in this case, the Court of Appeals found itself unable to follow its previous decision in the Hathorn case, and evaded reversing itself by holding that if the defenses of the defendant's answer were proved, that the statute would have no application.

A remarkable feature of the decision of Judge GRAY in

*People v. Gas Company, supra,*

is his holding that the burden is upon the defendant to affirmatively prove that no injury results to plaintiffs or others from the defendant's operations and that there is no common source of supply. This is tantamount to a holding that an indictment is sufficient to convict for a crime, unless the defendant shall prove his innocence. With these rulings that the burden of proof is upon the defendant to show that there is no common source of supply and no injury to any other property owner from the pumping operations, the holding that the statute has no application if there is not common source of supply, or if there is no injury to others, that it is preventing waste and adjusting rights in a common property,—the statute becomes so changed and distorted as to be absolutely unrecognizable as the act of the legislature of the State of New York.

With the necessary words and phrases read into the statute, so that some respectable basis may exist for such rulings of the Court of Appeals, the renovated statute forms a piece of unique legislation by the judiciary of the State of New York,



which, it is respectfully submitted should not receive the sanction of this Court.

Of course it is claimed that this Court is bound by the state Court's interpretation of a state statute. Beyond question the general rule is that where the construction given by the highest Court of a state to the statute of a state has been uniform and is settled, it is binding on the Courts of the United States. But while a settled construction of a statute may be controlling, a decision of a state Court as to the validity of the statute never controls this Court, where the statute is attacked as violative of the Federal Constitution.

As said by the late Mr. Justice PECKHAM, *Lindsley v. Gas Co.*, Opinion July 19, 1909 :

" As the question is one of an alleged violation of the Federal Constitution the judgment of the Court of Appeals is not final, although entitled to most respectful consideration upon that point."

*Chicago Ry. Co. v. Minnesota*, 134 U. S., 418-456.  
*Illinois C. R. Co. v. Illinois*, 163 U. S., 142, 152.

The question then arises, what construction has the state Court placed upon this statute? Here a remarkable situation presents itself.

In the *Hathorn* case (*supra*) the Court of Appeals upheld and affirmed an order of injunction *pendente lite* which enjoined the defendant in the words of the statute from, among other things,

" drawing, by pumping or otherwise, by artificial appliance from any well upon said defendant's said land, made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and excess of carbonic acid gas, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity other than in connection with the mineral water and other mineral ingredients with which it was associated, and from in any manner by pumping or artificial contrivance whatsoever producing an unnatural flow of carbonic acid gas issuing from, or contained in any well upon defendant's said land made

by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity, other than in connection with the mineral water, and other mineral ingredients with which it was associated."

Nowhere in that order is there any provision or limitation as to injury. At no place is it stated that the defendant can pump any reasonable amount or to an extent that will not injure. On the contrary, it is absolutely forbidden against all pumping no matter what the effect thereof. And such injunction was not granted for violation of any common law rights or upon proof of any injury by the defendant to plaintiffs. On the contrary, as stated in the recital thereof,

"the injunction is granted upon the sole ground that the plaintiff is guilty of a violation of the provisions of said statute."

This provision was inserted by the lower Court, which refused to grant an injunction upon common law rules.

Hathorn vs. Gas Co., 60 Misc., 340, at 344-5, where Judge HOUGHTON, in stating his reason for granting the injunction, said :

"Whether or not at common law the owner of one spring, who makes a business of selling the water, has the right to enjoin another, who on his own land has tapped this common source of supply, from sucking away by pumps and artificial means the gas and water, also for the purpose of sale, I do not purpose to discuss on this motion. The law upon the subject as found in *Smith v. City of Brooklyn*, 160 N. Y., 357; *Forbell v. City of New York*, 164 *id.*, 522; *Merrick Water Co. v. City of Brooklyn*, 32 App. Div., 454; *affd.*, 160 N. Y., 657, and *Hathorn v. Strong's S. S. Sanitarium*, 55 Misc. Rep., 445, is so uncertain that I should not feel justified in granting a preliminary injunction, especially where the springs are so widely separated and direct proof of interference is so meagre.

"I have concluded, however, that chapter 429 of the

Laws of 1908 should be held to be constitutional, and I therefore determine that the plaintiffs are entitled to an injunction restraining the defendant from a violation of that law."

We have, therefore, the Court of Appeals stating on the one hand that if no injury results the statute does not apply and an injunction cannot issue, and on the other hand the same Court enforcing the statute as an absolute prohibition without proof of injury. Which then is the construction here to be followed? Will this Court judge of the words of the Court or by its acts in enforcing the statute. The Court of Appeals in giving effect to its own decision has enforced the statute as an absolute prohibition, and the lower Courts in construing that decision have given it the same effect. After the decision in the Hathorn case (194 N. Y.) and in the People case (196 N. Y.) the defendant in the Hathorn case withdrew its demurrer, which it has been held admitted injury, and filed an answer identical with the answer in the People case. It then moved to vacate the injunction order. Such motion was denied and on appeal the denial affirmed on the authority of the above decisions. How, then, should the statute be construed? *According to its literal reading which is as the Court of Appeals enforces it or according to the reading of the Court of Appeals which it does not enforce.*

In this involved situation where is there that unanimity of opinion in the state Court as to the construction of the statute that binds this Court to follow its decision thereon. Where is there a clear and settled construction than can be here observed.

In

Town of Venice v. Murdock, 92 U. S., 494, at 501,  
it was said :

"It is argued, however, that the New York decisions are judicial constructions of a statute of that State; and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction; but they do not. They are not attempts at interpretation. \* \* \* There is, there-

fore, before us no such case of the construction of a State statute by State courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are."

That the State Court's decision upon the construction of the statute may be binding here it should be clear and unequivocal. It is not so in this case and the construction of the statute is open to the consideration of this Court.

Notwithstanding the doubt and uncertainty shown we are still prepared to go further and maintain that the statute is unconstitutional even under the most favorable construction that the appellees can claim from the Court of Appeals' decisions.

## II.

**The statute is violative of the Fourteenth Amendment under any construction that can be said to have been given it by the State Court.**

The most favorable construction that can be said to have been given to the statute by the Court of Appeals is that it shall be interpreted so as not to apply—

1. If there is no common source of supply ; or
2. If no injury results to others from the pumping of the defendant company.

We have already shown that the surface proprietor owns these minerals beneath the surface by the same title that he owns the land and that his right to collect the same is absolute, within the doctrine of *Merrick Water Co. v. City of Brooklyn* and like cases cited, the fact of injury through the depletion of the common supply being immaterial in the absence of waste. No beneficial use of the land can be affected by the taking and if a legitimate use is made of the product when thus taken, no one drawing on the common supply has a just cause of complaint. He may himself resort to the use of modern appliances and secure all of the common product that he requires in his

business. The fact that he prefers to stick to his old fashioned bucket should not prevent his neighbor from keeping pace with the advancement of science and adopting more modern devices such as steam pumps in the conduct of his business.

This statute, however, whether construed according to its terms or as applied by the Court of Appeals, prevents an owner of a well bored into the rock from taking for the purpose of vending the gas, such an amount as will affect adjoining proprietors. As such a restriction is contrary to the principles of the common law, under which the act has been tested, and violative of his rights of property in this gaseous water, the statute is invalid.

The owner of the well bored into the rock, who pumps for the purpose of vending the gas, may not do so if it affects his neighbor, while his neighbor who makes no such use, but nevertheless sells the water, by the statute is permitted to pump either from wells bored into the rock or otherwise to any extent, no matter what its effect may be upon the first owner, who is using the gas.

It is answered that the gas producer may invoke the common law and restrain the water man from such pumping. Such an answer affords no justification for this statute and moreover is founded upon a false premise. The common law permits of no such restraint as to the pumping of such a product. But assuming that it does so permit a great difference is at once apparent in the two cases.

Upon suit brought against the gas man under the statute he is presumed guilty and is therefore liable and enjoined unless he affirmatively shows that there is no common source of supply, or that his pumping causes no injury. Upon him is cast this burden of proving his innocence. To the contrary in the suit against the water man, he is presumed innocent until the gas man show affirmatively that there is a common source of supply and that the pumping of the defendant is a cause of injury to him. Can it then be said that the law bears equally upon all affected by it in the face of this burden which is placed upon the producer of gas from rock wells, and which is not imposed upon producers of gas from other wells or upon producers of water. And can it be said that a statute imposing greater burdens upon one than upon another of the same class is not repugnant to the Federal Constitution.

The burden in this case is not fanciful, but real, and substantial. It is as plainly apparent as though the Court had said in all cases brought to restrain pumping the defendant if his purpose has been the sale of the gas, shall be presumed guilty of injury to his neighbors unless he prove the contrary, but if his purpose has been the sale of the water shall be presumed innocent of injury to his neighbors unless the contrary be proved. Clearly the latter cannot withstand the objection that the equal protection of the laws is denied. Neither then can the statute here for such is the effect given it by the construction attributed to the Court of Appeals.

Nor can it be truthfully said that the placing of this burden of proof upon one and not upon his neighbor similarly situated is not a burden in the sense that it is forbidden by the Fourteenth Amendment.

In

County of San Mateo v. Southern Pacific Ry. Co.,  
13 Fed., 722-733,

it was said :

"The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms: in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts or the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

"Unequal exactions in every form, or under any pretense, are absolutely forbidden."

The case just cited involved the question of unequal taxation, but the character of the property taken does not control the principle involved. No matter whether the particular legislation in any case take tangible property or intangible property, whether it take or deny rights of property or impose burdens upon property it must bear equally upon all or receive condemnation from the Courts. Clearly this statute denies the equal protection of the laws, for as said by Justice FIELD it denies "the right of each to resort, on the same terms with others to the courts for the security of his person and property, and the prevention and redress of wrongs."

Moreover, the defendants contend that the statute is a criminal statute of the State by which the persons violating it may be punished pursuant to the provisions of the New York Penal Code (Sections 155 and 15) which fix the penalty for misdemeanors (unlawful acts) where no special penalty is provided in the statute as a fine of \$500 or imprisonment for one year, or both. Under this statute if the construction of the Court of Appeals be followed the defendant in any case upon proof that he is pumping the particular class of waters for the prohibited purpose is presumed guilty of a crime and subject to fine and imprisonment unless he can sustain the burden of proving his innocence and show that his acts have caused no injury to any common property. The gaseous water, the subject of any such suit, its underground wanderings, its extent and source are all alike invisible to the eye and heretofore considered by the Courts, matters of such speculation that interference by the Courts would be so unsatisfactory as to be wholly unwarranted. Now however a man's liberty and property is to be taken from him and he can be branded a common criminal and jailed with the thieves and cut throats unless he can sustain this burden, and overcome the presumption of his guilt by proving as certainties the uncertainties that exist beneath the earth's surface.

In

Wynehamer vs. People, 13 N. Y., 378, p. 446-447, it is said :

"Trials, therefore, at least such as are criminal are to be regulated and conducted, in their essential

features not by statutes, but by common law. This the constitution guarantees. Precisely how far the legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define; but I have no hesitation in saying that they cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our state constitutions, and is one of those rules which, in our constitution, are compressed into the brief but significant phrase, 'due process of law.'

"Can § 17 be reconciled with this rule? It provides that, upon every prosecution under the act, proof of a sale of liquor shall sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of a sale. It is plain that at common law the legal presumption would be directly the reverse of that declared by the act. Where the common law would presume innocence, this act presumes guilt. Either the guarantee of a judicial trial, according to the course of the common law, is a nullity, or this provision is void. But I am prepared to go further, and to hold that all those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase, 'due process of law.' If this be not the true interpretation of the constitution; if the legislature, in addition to declaring what acts and what intentions shall be criminal, can also dictate to courts and juries the evidence, and change the legal presumptions upon which they shall convict or acquit, there is no barrier to legislative



despotism; and the separation of the legislative and judicial departments of the government, the guarantee of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights."

In *People v. Lyon*, 27 Hun, 180, the Court had under consideration a statute prohibiting drinking in certain classes of wine shops and providing "that whenever any person is seen to drink in such shop any spirituous liquors or wines forbidden to be drunk therein, it shall be *prima facie* evidence that such liquor was sold by the occupant of such premises or his agent with the intent that same should be drunk therein." It was said, page 182 :

"In the present case the defendant is charged with having sold liquors with intent that they should be drunk on the premises. It is his right to have the question, whether he did so or not, tried by a jury. That means that the jury are to determine, from their own judgment upon the facts legally given in evidence, whether or not the defendant is guilty. If the legislature can declare that a certain fact is *prima facie* evidence of the defendant's guilt, such a declaration means that the jury must convict, unless the defendant explains away this evidence; and if they can declare a fact to be *prima facie*, it would seem to follow that they might declare it conclusive evidence."

In

*Railroad Co. v. Husen*, 95 U. S., 465, a statute of the State of Missouri, prohibiting all persons from driving or conveying certain cattle into the State during the summer months of the year was held to be unconstitutional. The statute was evidently intended to prevent the bringing in of infected cattle, but was so drawn as to prohibit the bringing in of any cattle of the particular class, whether infected or otherwise, except that a railroad or steamboat company might carry such cattle through the State without being unloaded, but in such case the railroad company would be responsible for all damages which might result from the disease called

Texas fever, should the same occur along the line of transportation ; and the existence of such disease along the line should be *prima facie* evidence that same had been communicated by such transportation. The statute, while declared bad, as interfering with interstate commerce, was also condemned as imposing unreasonable burden (p. 473) :

“ the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, ‘ You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they do an injury to the inhabitants of the State or not ; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.’ Such a statute, we do not doubt, it is beyond the power of the State to enact.”

And so it is here. The man who pumps from a well driven into the rock for the purpose of vending the gas, is, in any suit that may be started against him, presumed to have caused all injury the plaintiff may charge, without it being even shown in the first instance that any facts exist from which any inference could be drawn that his pumping is the cause of the injury. No matter how far his land may be from the plaintiff, no matter how many others may be pumping in the surrounding territory or between his land and the plaintiff, if it be shown that he pumps from the particular class of well for the prohibited use, he is presumed to have caused damage and may be enjoined from all further pumping unless he can prove the negative. The presumption is not drawn from any facts shown or admitted (see *People v. Gas Co.*, *supra*), but is said to be created by the statute. No proper basis in fact existing to sustain it, it cannot be upheld. The statute in creating such a presumption is arbitrary and unreasonable and denies due process of law.

The defendant alike in civil as in criminal actions is entitled to a presumption of innocence. Especially is this so in

civil actions where the judgment will establish the commission of a penal offense.

Grant v. Riley, 15 A. D., 190, 192.

"The presumption of the innocence of a defendant prevails in a civil action where a judgment against him will establish his guilt of a crime."

Pollock v. Pollock, 71 N. Y., 137, 142.

"The Court is not warranted in a conclusion of criminality when all that is proved is susceptible of a construction of innocence. Still less can it make inferences without actual facts to support them, \* \* \* and if there is any doubt the accused party is entitled to it."

Wilcox v. Wilcox, 46 Hun, 32, 40.

N. Y. & B. F. Co. v. Moore, 18 Abb. N. C. (Court of Appeals), 106, 119.

The Court of Appeals holds that the statute places upon the defendant the burden of showing that the statute had no application to it. Again is there a denial of due process of law. The rule applicable is that plaintiffs having invoked the aid of a statute have the burden of showing that their case is within the provisions of the statute.

City of Cohoes v. D. & H. C. Co., 134 N. Y., 397.

Miller v. Roessler, 4 E. D. Smith, 234.

If it be that the statute has no application where no common source of supply exists and no injury occurs, then it should follow that the plaintiffs must in order to bring their case within the statute, prove at least *prima facie* a common source of supply and injury by defendant to them. That such is the rule at common law is admitted, but it is now in this case said to be changed by the statute. If it is the statute that cause these changes in judicial rules and procedure as to one litigant in a particular case and not as to another similarly situated in the same or a like case, then it imposes unequal burdens and is repugnant to the Federal Constitution.

### III.

**The act denies the equal protection of the laws guaranted by Section I, of Article Fourteen of the Constitution of the United States, in that it prohibits pumping for the purpose of vending the gas, while permitting the same for any other purpose or use, and prohibits pumping of wells that go into the rock and permits pumping of wells that do not go into the rock.**

The act as it now stands declares unlawful and prohibits the pumping of water and gas from wells that are made by boring or drilling into the rock, where the purpose of such pumping is to sell the gas separate from the water and also prohibit accelerating the flow of gas from wells drilled into the rock by pumps or other artificial appliances, where the purpose is the sale of the gas.

It will be first observed that the remaining provision of act in question is not aimed at all wells, but is restricted to that class or character of wells that are made by boring or drilling into the rock, and as to such wells only, is pumping or the use of artificial appliances forbidden or declared unlawful. Consequently, in the case of wells not made by boring or drilling into the rock, it is presumably perfectly lawful, and undoubtedly useful and beneficial, to procure the water and gas or accelerate the flow thereof, or to retard the flow thereof to other wells, by means of pumps or other artificial appliances. It follows that the owner of a well not drilled into the rock may do that which the owner of a well made by boring or drilling into the rock may not do. Apparently, therefore, the law was enacted for the special benefit of the owners of the former class of wells. Such discrimination renders the law unconstitutional.

In the second place, it will be observed that while pumping is prohibited for the purpose of extracting and vending the gas separate from the water, there is no restriction against the use of pumps or other artificial appliances where the pur-

pose is not the extracting and vending of the gas separate from the water.

Again, therefore, is there a discrimination, for the statute operates solely against the gas industry, prohibiting any taking for its business and purposes, while permitting the taking of any quantity by any means for any other business or purpose.

And, again, the statute prohibits acceleration of the flow of gas, absolutely and in all cases from wells drilled in the rock where the purpose is selling the gas, irrespective of the effect of such acceleration upon any common source of supply or upon other wells.

The statute is entitled,

"An Act for the Protection of the Natural Mineral Springs and to Prevent Waste and Impairment of its Natural Mineral Waters."

Seemingly, the intent of the legislature was the prevention of waste, but the legislature is bound to see that the means employed bear some reasonable relation to the ends to be accomplished.

Assuming for the purpose of argument that the mineral waters of the State of New York, or of Saratoga, if you please, have a common source, and that any extraordinary draught upon such common supply would tend to deplete it to the injury of the common owners, nevertheless it must follow that pumping of that unreasonable amount, whether for one purpose or another, whether for the sale of the gas separate from the water or of the water separate from the gas, with or without the waste of the other constituents in either case, must equally deplete that common property, if such it may be called. And if the supply be a common one, then it must follow that drawing water from that supply, whether it be taken through a well which goes into the rock or from a well which does not go into the rock, must equally deplete the common property.

If the end to be accomplished is the protection and conservation of the waters, and the evil aimed at is the use of artificial appliances, then why should it be said that some springs shall not be permitted to pump, while others may be, and that some property owners shall not use pumps or other

artificial appliances, while others may continue such use, or that pumping for one commercial purpose shall be prohibited, while pumping for another permitted ?

The legislature cannot thus arbitrarily classify springs, the owners of springs, or the business being conducted, any more than it can say that no black men shall use artificial appliances, while all white men may. The Court must take cognizance of the fact that a cubic foot of water taken out from a well drilled into the rock, and for the purpose of vending the gas separate from the water, must contain the same amount of water, and must cause the same displacement, and leave the same depletion in the common supply, as a cubic foot taken out from a well not drilled into the rock, and for the purpose of vending the water separate from the gas, or for any other purpose except the vending of the gas.

It may be, of course, and in fact has been, argued that there is no excessive pumping except for the purpose of vending the gas separate from the water, but that argument has already been answered in our previous point, in which we think we have established beyond a doubt that the test of this kind of legislation is not what is being done, but what may be done under it.

If it appear that under the provisions of the act it is possible for the owner of a well that does not go into the rock, or even of a well that does go into the rock, who desires to use the product for any purpose other than the sale of gas, to pump any amount of this alleged common product, whether reasonable or unreasonable, while it appears that one who desires to pump it for the entirely innocent and harmless purpose of vending the gas is restrained from pumping, then there exists an inequality in the law and in its operation and effect, which must require its condemnation. Of course, it is claimed that there is no inequality in its application as between the different classes of wells, because all are alike prohibited from pumping from wells drilled into the rock, but this is not so. Pumping from wells drilled into the rock, where the purpose is the sale of gas is absolutely prohibited by all, the taking of even a reasonable amount being prohibited, but on the other hand, pumping from wells drilled into the rock, is not prohibited or even limited, where the purpose or use is any other than the sale of the gas.

It has been claimed that we are entitled to only a reasonable quantity of the common property. That is, of course, a matter that has been fully discussed in the preceding point and one which upon analysis has very little bearing upon this question of classification and discrimination.

Assuming, for the argument, that each land owner is entitled to take only a reasonable amount of this percolating water, nevertheless, he has a vested property right therein, which entitles him to secure that reasonable amount of the common property without interference or prohibition. This statute, which prohibits him from taking that reasonable amount, which prohibits him from taking any quantity for his purposes, must be invalid in that it places no prohibition or limitation upon other property owners against taking their reasonable share or any share for other purposes. The water and gas can be used but for commercial purposes, and then only as the different property owners are willing to dispose of the same. They can produce it or not as they see fit. Their right to do so must be equal. The public has no interest in the subject matter of the legislation, which gives the state the right to discriminate between the natural gas business and any other business that can be made of this product. Granted the right to legislate upon the subject at all, any statute enacted by the State must bear equally upon all without inequality between individuals or discrimination between industries. It shall not impose burdens upon one citizen that are not imposed upon his fellows, nor shall it work hardship to one business and benefits to another.

Under the Federal Constitution all citizens are equal, with equal rights and all industries are entitled to equal protection, unless there be something connected with them, or some of them that make them obnoxious, to the health, welfare or morals of the community.

Here, the business of the defendant company is purely private, and considered until the enactment of this statute harmless and innocent. It maintained no nuisance nor establishment that could be charged with being harmful to the health, welfare or morals of the community, and was in no way offending against the State, the people at large, or other prop-

erty owners in particular, so that it could be singled out as the subject for legislation and destruction.

Before classification of this kind can be successfully accomplished some difference must be shown, which bears a reasonable and just relation to the things, as to which the classification is established. To be Constitutional, the law must bear equally upon all engaged in a like business.

As said in

Missouri v. Lewis, 101 U. S., 22,  
as to the limitation of the Constitution (p. 31):

"It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

Again in

Reagan v. Farmers' Loan & Trust Co., 154 U. S.,  
362, at 399:

"The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

As to the application of the Fourteenth Amendment, it was said in

Barbier v. Connolly, 113 U. S., 27, at 31:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person



within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

In

Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, at 155, this Court held unconstitutional a statute of the State of Texas, which, in cases of claims for stock killed by a railroad, added a ten dollar fee to the attorney fee, Mr. Justice BREWER, writing the opinion, said:

" But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S., 68; *Railroad Company v. Mackey*, 127 U. S., 205; *Walston v. Nevin*, 128 U. S., 578; *Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232; *Pacific Express Co. v. Seibert*, 142 U. S., 339; *Giozza v. Tiernan*, 148 U. S., 657; *Columbia Southern Railway v. Wright*, 151 U. S., 470; *Marchant v. Pennsylvania Railroad*, 153 U. S., 380; *St. Louis & San Francisco Railway v.*

*Mathews*, 165 U. S., 1) ; yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Mr. Justice BREWER then cites and quotes with approval from these cases (pp. 155-156).

*State v. Loomis*, 115 Mo., 307, 314,

" ' Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon statute or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.' "

*Vanzant v. Waddel*, 2 Yerger, 260, 270.

" ' Every partial or private law, which directly purposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies

would be governed by one rule, and the mass of the community, who made the law, by another.' "

*Dibrell v. Morris' Heirs*, 15 S. W. (Tenn.), 87, 95.

" ' We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.' "

In

*Cotting v. Kansas*, 183 U. S., 79,  
a statute of the State of Kansas, defining public stock yards and basing the same upon the amount of business done, and then defining the duties of persons operating the same, and regulating charges thereof, etc., was held in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applied only to the Kansas City Stock Yards Co. and not to other companies or corporations engaged in like business in Kansas, and thereby denied to that company the equal protection of the laws. The Court there said (pp. 111, 112) :

" But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. \* \* \*

and the door is opened to that inequality of legislation which Mr. Justice CATRON referred to in the quotation above made. \* \* \* If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In

Connolly v. Union Sewer Pipe Co., 184 U. S., 540, this Court held unconstitutional a statute of the State of Illinois, which prohibited trusts, combinations in restraint of trade, etc., but which improperly provided that the provisions of the act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

The Court, in admitting the power of the State to classify for purposes of taxation, said (p. 563) :

" But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time indirectly to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

And again, page 564 .

" We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

And so it is in this case, that if we pump for the purpose of vending the gas we become criminals under the provision of the statute making such act unlawful, while if some other owner pump, for the purpose of selling the water or wasting it, his acts are entirely proper and lawful. Under the N. Y. Penal Code we can be fined and imprisoned for such unlawful act while our neighbor goes free and enjoys continued and increasing profit at our expense.

In

People v. Van De Carr, 91 App. Div., 20; affd. 178 N. Y., 425,

a statute forbidding the use of pictures of the flag for advertising, but allowing its use by book-sellers and jewellers, was held void as class legislation, and as denying the equal protection of the laws.

In

People v. Murphy, 195 N. Y., 126,

a municipal ordinance limiting the height of bill-boards upon the roofs of houses on private property to nine feet and prohibiting the erecting of higher signs, no matter how well secured, was held arbitrary and unreasonable, and not a proper exercise of the police power, being enacted simply to restrict or prevent the display of advertisements.

In

People v. Zimmerman, 102 App. Div., 103,

a statute forbidding the issuing of trading stamps, unless there was printed legibly thereon a statement that they were

redeemable in money, was held void because it was really class legislation against a successful competitor, although it purported to be solely for the general good.

The question of the arbitrary classification created by this statute, was first raised in this case before the Circuit Court, on a motion for a preliminary injunction, Judge WARD, in deciding that motion, said :

*Lindsley v. Gas Co.*, 162 Fed. Rep., 954, at 960.

"The last lines of the first section of the statute apply to acts generally, whereas all the rest of the section applies solely to acts connected with wells bored into the rock. These lines are as follows :

" 'The doing of any act or thing whatsoever whereby the natural flow from any spring or well of that class of mineral waters holding in solution natural salts or an excess of carbonic acid gas is impeded, retarded, diminished, diverted or endangered, or the quality of its water is impaired or the quantity of its carbonic acid gas or mineral ingredients diminished is hereby declared to be unlawful.' "

"The owner of wells in fissures or that merely reach the rock may, subject to this restriction, increase the natural flow of the water or of the gas and impound the gas to be sold as a commodity.

"Assuming that the complainant, in his character as bondholder of the defendant the Natural Carbonic Gas Company, has the right to urge it, this objection causes much doubt, because there does seem to be a discrimination between persons carrying on the same business. The seat of the gas is in the rock. If the mineral waters and the gas come from a common source of supply, it would seem to follow that the pumping of any well, whether bored into the rock or merely reaching the rock, would diminish the supply of each ; but, if so, the pumping of wells not bored into the rock which injures other wells is made by the statute unlawful, and there is no practical discrimination.

"A federal court of first instance, acting upon affidavits, which pronounces a state statute unconstitu-

tional, assumes a grave responsibility justified only by most exceptional circumstances. The Legislature must be presumed to have acted with full information on the subject regulated and with an honest purpose. Although I do not discover it in the papers submitted, there may be a reasonable basis for the discrimination between wells that go into the rock and wells that do not. At all events, pumping of wells that do not go into the rock, which results in injury to any other well, is unlawful and may be enjoined just as the pumping of wells that go into the rock may be enjoined. It is to be presumed that the courts of the State of New York, if asked to enforce this law, will refuse a preliminary injunction, if it be made clear that the law does unreasonably discriminate between persons carrying on the same business."

Judge WARD, it will be noticed, finds that in the first three prohibitions a discrimination exists between the two classes of wells, but that such discrimination is obviated by the last clause of the first section, which comprises what we have heretofore called the fourth prohibition of the statute. Judge WARD plainly indicates that but for that fourth proposition, he would hold the statute unconstitutional, as creating an arbitrary classification. But this fourth prohibition which Judge WARD held saved the statute from condemnation, was admitted before the Court of Appeals in the *Hathorn* case to be so broad as to be unconstitutional, and so held by the Court of Appeals.

*Hathorn v. Gas Company*, 194 N. Y., 326, at 341:

"As already stated, these prohibitions are four in number and in effect they respectively forbid \* \* \* first, second \* \* \* third \* \* \* and fourth prohibit the doing of any act whereby the flow or quality of the waters described or of the carbonic acid gas or other mineral ingredients therein in any spring or well is diminished, etc.

"It was substantially admitted by the respondents that the last prohibition was so broad and unqualified as to be unconstitutional and inoperative, and that, therefore, may be eliminated from our consideration."

We now have remaining, therefore, only the third provision, prohibiting the pumping of wells going into the rock for the purpose of selling the gas. Standing alone, such provision within the reasoning of Judge WARD must be unconstitutional for the arbitrary classification created. While Judge WARD seemed satisfied at that time to give the statute the benefit of the doubt, because of such general provision, it is submitted that an analysis of the statute would show that the defect of discrimination, as pointed out by him, was not obviated by the section he quotes. That section prohibited the doing of any act whereby the flow from any spring or well was impeded, retarded or diminished, or the quality of its water impaired, or the quantity of its gas or mineral ingredients diminished. It still permitted the owners of wells not drilled into the rock, by pumping or other artificial means, to increase the flow of the mineral waters or of the gas, whether for the purpose of vending the gas separate from the water or otherwise, provided they did not impede or retard the flow of other springs or injure the quality of the water.

The owner of a well bored into the rock, could not, however, under any circumstances, pump for the purpose of vending the gas, nor accelerate the flow for such purpose, whether he injured other springs or whether he did not.

The Court of Appeals in

*People v. Gas Company, supra,*

was asked to reverse upon these grounds its previous decision in the Hathorn case and its previous upholding of the statute. It evaded such reversal, by stating that the defendant should be permitted to prove affirmatively that there was "no difference in effect upon the general source of supply between pumping from wells bored into the rock, or from those driven into the soil, or in the effect upon the springs or other land owners;" and also by assuming that the legislature had assumed the existence of a notorious fact "that gas, as an elastic aeriform fluid, when confined, exerts pressure; that the natural tendency will be to to expel the waters which hold them in solution, when generated, through any vent, or opening, in the rocks, where confined, and that the boring of wells into such rocks would diminish the pressure and thereby destroy, or seriously impair, the force, which was necessary to the natural flow observed in the mineral springs."



This assumption by the Court of Appeals was taken from general allegations of the complaint in the action before it. Such allegations by the defendants' answer were denied unqualifiedly in their application to the situation under consideration and the assumption based thereon by the Court of Appeals was entirely unwarranted and in itself sufficient to show what a poor piece of legislative work this statute represents.

It is submitted that if the statute cannot stand by itself because of arbitrary classifications, which appear upon its face, or because, from any angle from which it is viewed, it appears unconstitutional, as taking property without due process of law or compensation, and denying the equal protection of the laws, then the allegations of the complaints in the Hathorn case, in the People case, or any other action brought to enforce its provisions upon any particular state of facts, will not cure the existing defects and save it from condemnation.

#### IV.

**The statute violated Section One of Article Fourteen of the Constitution of the United States, in that it takes private property for private purposes.**

That the State in a proper case may exercise the right to acquire private property for public purposes upon making due compensation therefor has never been questioned, yet in no case, whether compensation be made or not, has it ever been held that the State can take by legislation or otherwise private property for private purposes or deprive one individual of his rights in property for the benefit of another.

We have already shown that the Courts have uniformly held that depriving a person of any right in property is a taking of property within the meaning of the Fourteenth Amendment to the Federal Constitution, and consequently extending that ruling within its logical limits it must follow that depriving any person of any right in property for the

benefit of another individual is a taking of private property for private purposes.

*In re*

Albany Street, 11 Wend., 151,  
the Court said :

“ The Constitution by authorizing the appropriation of private property for *public use*, impliedly declares that, for *any other use*, private property shall not be taken from one and applied to the use of another.”

In the case of

Bloodgood v. R. R. Co., 18 Wendell, 9,  
the power of the legislature to take property for public uses was fully discussed, and Senator Tracey, at page 59, says :

“ It is, therefore, to be construed as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken only for public use and then only upon a just compensation.”

In

Missouri Pacific Ry. v. Nebraska, 164 U. S., 403,  
this Court condemned an order of the Nebraska State Board of Transportation, which directed the Company to grant to certain individuals the right and privilege of erecting an elevator upon the grounds of the Railway Company at its station at Elmwood, saying, p. 417 :

“ This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment

of the Constitution of the United States. *Wilkinson v. Leland*, 2 Pet., 627, 658; *Murray v. Hoboken Co.*, 18 How., 272, 276; *Loan Association v. Topeka*, 20 Wall., 655; *Davidson v. New Orleans*, 96 U. S., 97, 102; *Cole v. La Grange*, 113 U. S., 1; *Fallbrook District v. Bradley*, ante, 112, 158, 161; *State v. Chicago, Milwaukee & St. Paul Railway*, 36 Minnesota, 492."

No general definition of the words "Public Use" has ever been made or attempted by the Courts, although certain principles by the application of which the question can be determined have come to be universally recognized.

In *Gilman v. Line Point*, 18 Cal., 229, BALDWIN, J., said :

"The words public use here mean a use which concerns the whole community as distinguished from a particular individual or a particular number of individuals. It is not necessary that each and every member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. \* \* \* If the use for which the property is taken *be to satisfy a great public want or exigency* it is a public use within the meaning of the Constitution."

In

*Tyler v. Beacher*, 44 Vt., 656,  
the Court denied a petition to condemn land for a grist mill, saying :

"It is to be considered that this taking would be for the public benefit, \* \* \*, but the benefit would not arise out of any use the public would acquire by the taking but out of the better use the petitioner would make of the property than the respondents would."

In other words, there is a substantial distinction between a *use* by the public and a *benefit* to the public from some one else's use. Clearly under the authorities the latter is not enough, and to justify the taking the public must in some sense *use* the property taken.

In

*Cole v. La Grange*, 113 U. S., p. 1,  
this Court held that the general grant of legislative power in the Constitution of a State does not authorize the legislature in the exercise of an eminent domain or in the right of taxation to take private property without the owner's consent for any but a public object. It accordingly upheld a judgment for the defendant in an action brought to recover the amount of coupons for interest on certain bonds issued by the City of La Grange to the La Grange Iron and Steel Company as a donation to the manufacturing enterprise conducted by that company. The Court found that such manufacturing enterprise "was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character," further saying, p. 9:

"The ordinance referred to shows that the mill was to manufacture railroad iron; but that is no more a public use than the manufacture of iron bridges, as in the *Topeka Case*, or the making of blocks of stone or wood for paving streets. There can be no doubt, therefore, that the act of the legislature of Missouri is unconstitutional, and that the bonds, expressed to be issued in pursuance of that act, are void upon their face."

Likewise in

*Great Western Natural Gas & Oil Co. v. Hawkins*,  
30 Ind. Appeal, 566; 66 N. E., 765,  
the Indiana Court refused to permit the Gas Company to condemn property for its pipe lines, because it did not clearly appear that the pipe lines or the gas were to be devoted to a public use, saying, page 768:

"Nor will the legislative declaration that the use for which authority is given to exercise the right to seize the property of the individual is a public use make it a public use. 'Whether the uses is a public one is a judicial question, and not a legislative one.'

"It must be conceded that in this state private property can be taken only for a public use. And 'it

is conceded on all hands,' says Judge COOLEY, 'that the Legislature has no power, in any case, to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for the public benefit.' "

" In determining whether a proposed use is public, we must look not only to the character of the business to be done, but also to the proposed manner of doing it. If the use is merely optional with the owners, or the public benefit merely incidental, it is not a public use authorizing the exercise of the power of eminent domain. There must be in general a right to a definite use of the property, a right which the law compels the owner to give to the general public, and which is guarded and controlled by the law. It is not enough that the general prosperity of the community is promoted. 'Public interest' and 'public use' are not synonymous. The establishment of furnaces, mills, and manufactories, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings.' Matter of Niagara, etc. R. Co., 108 N. Y., 375, 15 N. E., 429. 'The true criterion,' said the court in Market Co. v. Railroad Co., 142 Pa., 580, 21 Atl., 902, 989, 'by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission. The test is, not what the corporation owning the land may choose to do, but what, under the law, it must do, and whether a public trust is imposed on the land.' "

In Huber v. Merkle (*supra*) upon a similar statute it was aptly said:

" We find ourselves unable to comprehend how, under these principles, the law in question can be sustained as an exercise of the police power. It does not even pretend to conserve any public interest. Upon its face its purpose is to promote the welfare of one citizen,

by preventing his neighbor from using his own property."

Sedgwick in his treatise (2nd Edition, p. 450) on this subject divides the public uses for which property may be taken into three classes :

"1. Where the object is purely governmental, as a fort, court house, etc.

"2. In the case of highways, railroads, bridges and all other such public means of travel and of transport.

"3. In which the use is restricted to a particular locality or community in which all members of such community, or inhabitants of such locality, are necessarily interested and benefited by the use—that is by what makes the use public, rather than private. But the feature in all instances of this class which has this public character and in which all the members of the special community are thus necessarily interested, is *the promotion of the common health*. In this class fall the cases which uphold the swamp draining, the sewerage of cities, the removal of dams and stagnant waters and the like. Here belong the case of water supply for cities, waters being a sanitary necessity to the whole community as much as air."

In the case under discussion no claim can be made that any public use is to be made of the springs at Saratoga or of the springs or wells in any other County. Neither the welfare nor the health of Saratoga or of any community depends upon the life or condition of the mineral springs or wells in question. The water supply of the village of Saratoga is not supplied from these springs, nor will the inhabitants of that locality have any use thereof or of the rights of this Company to pump the same, and the only benefit, if any there be, will be such as accrues to the individual owners of so-called natural springs, who will by the removal of their competitors have a wider field for business operations.

Claim has been made, although not as yet proven, that by such pumping the flow of the natural springs has been generally affected and injured and in many cases entirely destroyed. This, however, is a question of fact which has not been litigated or tried out before any Court or jury.

The spring owners are engaged in bottling and shipping

for commercial purposes such waters and gas, and are annually realizing a large profit thereon. Claiming to be aggrieved by the pumping of their competitors in Saratoga, who, as said before, are not alone shipping gas but are also bottling and shipping waters, these spring owners have inspired the citizens of this village to object to pumping the wells, have organized citizens' committees, ostensibly to care for the welfare of the village in this respect, and have gained the ear of the legislature and secured the passage of a bill which prohibits the pumping of waters containing an excess of carbonic acid gas, or of pumping the gas itself, not by themselves but solely by persons having wells in a limited part of the State, which are made by boring or drilling into the rock, thereby prohibiting only certain owners in certain localities from pumping such waters and gases, and reserving to themselves the sole and exclusive right to pump the waters, extract the gas and ship the same for commercial uses, thus stifling competition, giving them a larger field for business operations and a correspondingly increased profit.

*We repeat again, that the restricting of the use of property or the taking or depriving of any right therein is a taking of property within the meaning of the Constitution, and when such restriction or taking is primarily for the benefit of other individuals, or to aid the use by individuals of their property, in which the public has no use but only an indirect benefit, if any, then the taking is of private property for private purposes and is prohibited by the Constitutional enactments.*

## V.

**The amended bill in this case is well founded and properly upheld by the Court as good against the causes assigned by the demurrers, apart from the main Constitutional questions.**

Judge LACOMBE at Circuit, in dismissing the amended bill, placed his decision flatly upon the question of the constitution-

ality of the statute. We do not think it can be said that in so doing he ignored the other causes of demurrer, but rather that he did not consider them sufficient to entitle the appellees to have their demurrers sustained and the bill dismissed. In this he but followed and agreed with the decision of Judge WARD, who had previously decided all the other questions against the defendant's contention on the motion made for a preliminary injunction.

The first cause assigned for the demurrer is (Record, p. 18):

1. That the complainant has not alleged or shown that he is the holder or owner of any of the bonds or stock of the defendant Gas Company.

2. That no valid contract is alleged or shown whereby the defendant Gas Company assumed or became liable to pay any of the bonds mentioned.

3. That it is not alleged that the complainant is a creditor of the defendant Gas Company, nor any facts stated from which it may be inferred that complainant is a creditor.

It is sufficient answer to these objections to refer to the allegations of the bill (Record, p. 8) in which it is directly alleged that the complainant is the owner and holder of capital stock, both preferred and common, of the defendant Gas Company, is the owner and holder of five first mortgage gold coupon bonds of the defendant Gas Company, and is the owner and holder of 19 ten year six per cent. sinking fund gold debenture bonds of said Company, and is the owner of thirty-five shares of the preferred and twenty-seven shares of the common capital stock of said company. The statement that the complainant is the owner and holder of such bonds and stock is clear and unequivocal, and the defendants' demurrers in that respect are frivolous.

This is likewise true of the objection that no valid contract is alleged or shown whereby the defendant gas company assumed or became liable to pay any of the bonds mentioned.

It is alleged in the bill (Record, pp. 8, 9) that the defendant gas company did in fact issue the bonds and agree to pay for them, and that it has paid interest thereon from the profits of its business conducted upon and with its property in the village of Saratoga Springs. It cannot be said that the defendant gas company could not legally assume and agree to



pay and become liable for the bonds mentioned, or that it was without power so to do, and the demurrer admitting as it does the fact of assumption, agreement to pay and liability therefor, cannot be said to raise any issue of law.

The third subdivision of the first cause of demurrer is likewise without merit for the complainant in his amended bill (Record, p. 8) shows himself to be the holder of 19 debenture bonds of the said company, which bonds manifestly are unsecured and make their owners but general creditors of the corporation, subject to the rights and restrictions conferred and imposed by the debenture bond agreement, under and pursuant to which they were originally issued.

The second and third causes of demurrer (Record, pp. 18, 19), with their respective subdivisions, are practically identical.

Subdivisions 1, 2, 3 and 4 of the second cause of demurrer, and subdivisions 1 and 2 of the third cause of demurrer, involve the construction of the 94th Equity Rule. Judge WARD in his opinion in this case,

Lindsley v. Natural Carbonic Gas Company, 162  
Fed. Rep., 954, 957,

in passing upon these objections, said :

“ It is objected, in the first place, that the complainant cannot assert his rights as a stockholder because of his failure to comply with the ninety-fourth rule in equity. Inasmuch as the jurisdiction of the court depends not only upon diversity of citizenship, but upon constitutional grounds, the rule is not applicable. It was enacted to prevent collusive actions in the federal courts by non-resident stockholders on the ground of diversity of citizenship, and also to prevent stockholders from asserting rights of a corporation which should be asserted by its directors. In this case the court has jurisdiction because of the constitutional questions raised, and it is quite evident that the gas company and its directors must be in entire sympathy with the bill. *Kimball v. City of Cedar Rapids* (C. C.), 99 Fed., 130. Individual stockholders proceeded in the cases of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and *Ball v. Rutland Railroad Company* (C. C.) 93 Fed. 513. Besides, the complainant, in his char-

acter as creditor of the gas company and holder of bonds secured by mortgage on its premises, is entitled to assert his rights on behalf of himself and of all other bondholders. This was done by the trustee of the bondholders in the case of *Reagan v. Farmers' Loan & Trust Company*, 154 U. S., 362."

The cases cited by Judge WARD on this point fully sustain the conclusion reached by him.

For a full discussion of the application of the rule see the case of

*Kimball v. City of Cedar Rapids*, 99 Fed. Rep., 130.

The rule was never intended to, and does not, apply to a cause in which the jurisdiction of the Federal Court does not depend upon diverse citizenship. It has been applied in a great many cases, but in not one where it was enforced was the complainant entitled to sue in the Federal Court but for the fact of diverse citizenship.

On the other hand, in every case where this rule has been considered, and in which the Court had jurisdiction, irrespective of the residence of the parties, the Federal Courts have held that the rule did not apply.

*Kimball v. City of Cedar Rapids*, *supra*.

*Ball v. Rutland Ry.*, 93 Fed. Rep., 513.

*Smyth v. Ames*, 169 U. S., 466.

Moreover the cases to which the 94th Equity Rule applies are cases in which the complainant's cause of action is based upon a derivative right acquired by the complainant as stockholder from the defendant corporation and the rule had no application to the case of a stockholder who has a separate independent interest and property right which he alleges the defendants are seeking to destroy. The mere fact that the corporation has a similar right does not mean that it is the same right. In other words, the complainant alleges that he is the owner of property which the defendants are about to destroy, and the fact that the defendant company might also take action to protect its property does not prevent the complainant from protecting his. The complainant is owner of

the stocks, debenture bonds and mortgage bonds of the defendant Gas Company and as such owner is entitled to protection and relief irrespective of the defendant Gas Company.

As said by Judge McCORMICK, when granting a temporary injunction in the very similar case of

Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. Rep., 529, at p. 536 :

" It is apparent from the record that the controversy is not between the complainants and the railways, but between the railways and the other defendants.

\* \* \* The complainants here show equitable interest in the fair earnings of the roads ; they show actual ownership and possession of the mortgage securities of the roads, both of which they allege are being irreparably injured and threatened with destruction by the defendants. \* \* \*

" It may be that the railway companies could \* \* \* have brought these suits and obtained all the relief to which the complainants are entitled against the other defendants, or it may be that they could not. If they could not, that would only be one additional reason why the complainants should sue ; and if the railways could have so sued, that would be no reason for denying the complainants any right even if, as seems to be hinted rather than charged, the railways could only have resorted to the State Courts ; and that there was a previous understanding between the complainants and the railways that the relief complainants desired and believed themselves entitled to receive, would be more likely to be speedily and adequately extended in the National Courts. It was to meet such cases that the National Courts were established. In them parties ' may hope to escape the local influences which sometimes disturb the even flow of justice.' Davis v. Gray, 16 Wall., 221."

As to the right of a bondholder to maintain such an action, see, also,

Mathews v. Board of Corp. Comr., 97 Fed., 400.

Peik v. Chicago, etc., Ry. Co., 94 U. S., 164.

Stone v. Farmers' Loan & T. Co., 116 U. S., 307.

In

Bagshaw v. The Eastern Ry. Co., 2 Macn. & G.,  
387, at 401,

the Court said :

"The plaintiff, it is true, is a member of the Company, but he is also a proprietor of the particular stock. He and those who have advanced the money which formed that stock being the holders of the scrip upon which it is secured have an interest totally unconnected with the general purposes of the company, and that is the very ground of the plaintiff's equity. If he had no scrip he would be merely a member of the company, but having that scrip he files his bill as proprietor of that scrip. The case is thus entirely clear of all those authorities referred to and it gives to that description of persons who are represented by the plaintiff, and to the plaintiff himself, a *locus standi* to see to the application of the money as to which the scrip is held quite unconnected with and independent of any objection that might arise from the plaintiff being a member of the company."

See, also,

Herrick v. Grand Trunk, 7-8 Can., L. J., O. S.,  
240,

where the right of a bondholder to sue was upheld.

The bill is sufficient then, whether we treat the complainant as a stockholder, mortgage bondholder or debenture bondholder, he alleges ownership of the three kinds of securities.

(a) Because as a stockholder the 94th Equity Rule does not apply in this action, even if his rights are derived from the corporation, and we contend they are not.

(b) Because as a mortgage bondholder (the 94th Equity Rule referring to stockholders action only) the complainant has a property and property right independent of the corporation and may maintain the action irrespective of the corporation and of the trustee under the mortgage securing the bonds, and

(c) Because as holder of debenture bonds he has a like

independent property and property right which he alleges is also being violated, and for which bonds no security is pledged and for which there is no trustee who has power to bring such an action to prevent injury to the bonds and their holders.

Nor is the complainant compelled to resort to the State Courts.

*Smyth v. Ames*, 169 U. S., 466, at p. 516.

"But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne v. Hook*, 7 Wall., 425, 430; *McConihay v. Wright*, 121 U. S., 201, 205. A party by going into a national court does not, this Court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis v. Gray*, 16 Wall., 203, 211; *Cowley v. Northern Pacific Railroad*, 159 U. S., 569, 583. So, 'whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State cannot tie up a citizen of another State, having *property rights* within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' *Regan v. Farmers' Loan & Trust Co.*, 154 U. S., 362, 391; *Mississippi Mills v. Conn.*, 150 U. S., 202, 204; *Cowles v. Mercer Co.*, 7 Wall., 118; *Lincoln County v. Luning*, 133 U. S., 529; *Scott v. Neely*, 140 U. S., 106; *Chicot County v. Sherwood*, 148 U. S., 529; *Cates v. Allen*, 149 U. S., 451."

The fifth and sixth subdivisions of the second cause of demurrer are fully answered by reference to the allegations of the amended bill (Record, pp. 14-15-9) in which it is distinctly stated that unless defendants be enjoined as prayed, the acts they are threatening to commit will destroy the business of

the defendant Gas Company, the business of the company will be ruined, the company itself will be destroyed, its property rendered of little value, and the bonds and stocks of the complainant will thereby be rendered worthless and of no value; and the bonds and stocks of the other bondholders and stockholders of said Gas Company will likewise become worthless and of no value, and the complainant will suffer irreparable injury therefrom.

The fifth subdivision of the second cause of the demurrer (Record, p. 18) would lead one to suppose that the defendants contend that the value of said bonds would not be impaired if the property of the defendant Gas Company and the defendant itself were destroyed, because the original maker might still be liable and able to make good. We cannot see that such a contention could have any weight, for the destruction of any part of the security undoubtedly impairs the value of the bonds, and to that extent injures the owner and holder.

The predecessor Company of the defendant Gas Company has ceased to exist—has been dissolved, and there is nothing back of the bonds but the defendant Company.

The seventh subdivision of the second cause of demurrer (record, p. 19) set forth that the complainant has failed to show any reason why he should be permitted to interpose and enforce the rights and remedies belonging to the defendant Gas Company.

It is submitted, however, that the complainant does not bring this bill or interpose to enforce the rights and remedies of the defendant Gas Company, but appears here asking this Court to protect his rights and the rights of other bondholders. In his character as a creditor of the Gas Company, as a stockholder and the holder of bonds secured by mortgage he is entitled to assert his rights on behalf of himself and others similarly situated.

See

Lindsley v. Natural Carbonic Gas Company, 162  
Fed. Rep., 954.

Reagan v. Farmers' Loan & Trust Co., 154 U. S.,  
362.

It is also objected (record, p. 19) that the Federal Court had no power to grant the relief sought by the appellant and could not restrain the enforcement of the statute.

Similar statutes have been construed and defendants restrained by the Federal Courts from enforcing their provisions in the following cases :

- Consolidated Gas Co. v. City of New York *et al.*, 157 Fed. Rep., 849.
- Smyth v. Ames, 169 U. S., 466.
- Reagan v. Farmers' L. & T. Co., 154 U. S., 362.
- Kimball v. City of Cedar Rapids, 99 Fed. Rep., 130.
- Mathews v. Board of Corp. Comr., 97 Fed. Rep., 400.
- Ball v. Rutland R. Co., 93 Fed. Rep., 513.
- Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. Rep., 529.
- Louisville & N. R. Co. v. McChord, 103 Fed. Rep., 216, at 220, 221.
- Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. Rep., 720.
- Iron Mountain R. Co. v. City of Memphis, 96 Fed. Rep., 113, at 131.
- Southwest Missouri Light Co. v. City of Joplin, 101 Fed. Rep., 23, at 33.

This point was fully discussed and decided against the defendants' contention of Judge WARD in his opinion rendered herein (162 Fed., 954), in which he states :

"It is next objected that this Court cannot issue an injunction to stay proceedings in the State Court, section 720, U. S. Rev. Stat. ; nor enjoin the State, 11th Amendment to the Constitution ; nor as a Court of equity enjoin criminal prosecutions.

"The acts declared by the statute to be unlawful became misdemeanors under Section 155 of the Penal Code and punishable under Section 15 by imprisonment in the penitentiary or in the county jail for not more than one year or by a fine of not more to \$500 or both.

"So far as Section 720 is concerned, it does not apply, because no proceedings, civil or criminal, have been begun in the State Court (*Fisk v. Union Pacific Railroad Co.*, 10 Blatchf. 518). In respect to the Eleventh Amendment, this is not a suit against the State (*Smyth v. Ames*, *supra*). Finally, although it is the general principle that Courts of equity cannot en-

join criminal proceedings, still there are exceptions to the rule (*Prout v. Starr*, 188 U. S., 537). Mr. Justice BROWN, speaking of that case in *Davis v. Los Angeles*, 189 U. S., 207, said :

“ Plaintiff seeks to maintain its bills under the exceptions above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of *Regan v. Farmers' Loan & Trust Co.*, 154 U. S., 362, in which under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the railroad commissioners of that State, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the State, who under color or an unconstitutional statute were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding (*Springhead Spinning Co. v. Riley*, L. R., 6 Eq., 551, 588).

“ See also *Camden Co. v. City of Catlettsburg*, 129 F. R., 421. It is worth observing that no such objection was made or considered in *Smyth vs. Ames*, *supra*.”

The sixth and seventh causes of demurrer assigned by the defendants (record, p. 19) are that it appears from the face of the amended bill that the complainant has an adequate remedy at law, and that complainant has not in his amended bill stated such a case as entitled him to the relief prayed for. While we do not admit that complainant has an adequate remedy at law, and in fact expressly charge to the contrary,



we do not consider that the existence of a remedy at law in the State Court will prevent the complainant from evoking the equitable aid of this Court to protect his property and property rights.

See *Smyth v. Ames*, 169 U. S., 466, at 516, where the Court stated :

"We cannot accept this view of the equity jurisdiction of the Circuit Court of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State Court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States (*Case of Broderick's Will*, 21 Wall., 503-520; *Holland v. Challen*, 110 U. S., 15, 24; *Dick v. Foraker*, 155 U. S., 404, 415; *Bardon v. Land & River Imp. Co.*, 157 U. S., 327, 330; *Rich v. Braxton*, 58 U. S., 375, 405). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction (*Payne v. Hook*, 7 Wall., 425, 430; *McConihay v. Wright*, 121 U. S., 201, 205)."

And again at page 517, quoting from *Reagan v. Farmers' L. & T. Co.*, 154 U. S., 362, 391 :

"A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress

in its own courts (*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362, 391; *Mississippi Mills v. Cohn*, 150 U. S., 202, 204; *Cowles v. Mercer Co.*, 7 Wall., 118; *Lincoln County v. Luning*, 133 U. S., 529; *Scott v. Neely*, 140 U. S., 106; *Chicot County v. Sherwood*, 148 U. S., 529; *Cates v. Allen*, 149 U. S., 451."

And in the case of

*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, the Court, at page 393, said :

" \* \* \* and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably, indeed, the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal Courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls."

The complainant alleges that if the defendants are permitted to enforce said Act against him and against the defendant Gas Company that its and his property will be irreparably injured and destroyed and that this is so is clearly shown by the facts stated in the amended bill (Rec., pp. 14, 15 ; 8, 9).

It is alleged that if the defendants are permitted to secure, as they threaten and have attempted to do, injunctions from local State Courts against the defendant Company, restraining it from pumping, before the constitutionality of the Act is decided by this Court, the Company's business will have been dissipated and ruined, its property irreparably injured and destroyed, and the property of complainant likewise irreparably injured and destroyed and the Company to all intents and purposes will be extinct. The truth of these allegations has already been shown to the Court.

It is also alleged (Rec., p. 14), that it is threatened with a multiplicity of actions by the Attorney-General and numerous tax payers, in which injunctive relief will be asked restraining it from doing some or all of the acts prohibited by the statute,

so that without the equitable aid of the Circuit Court its property would be eaten up in fines and expenses of litigation, its business ruined, its property destroyed, and it and complainant would suffer irreparable injury. These allegations have been proven only too true. We think no clearer case for equitable relief could be stated.

Great stress is laid upon the charge that the Gas Companies are ruining Saratoga. We deny that such is the fact. The Court of Appeals in the Hathorn case, because of the admissions resulting from a demurrer interposed for the purpose of testing the complaint, seemingly believed the Gas Companies were causing Saratoga's destruction and strained itself to bring the case within the principles of the Forbell case, and apply here the rules adopted there. The claim of damage is just as fanciful here as it was in the Forbell case, and the destruction and injury imagined does not exist. Neither did it exist in the Forbell case to anything like the extent believed by the Court of Appeals.

In the Forbell case, the first of its kind, very little defense seems to have been made upon the facts, the attorneys for the City relying upon the law as then represented by *Pixley v. Clarke, supra*, and like cases. It seems to have been there conceded that the effect of the pumping was to lower the sub-surface water table within an area of five to eleven square miles, and this was deemed by the Courts intolerable and not to be permitted. The immediate result of such decision was the commencement of innumerable actions against the city with claims for damages aggregating millions of dollars. The City then found it necessary to go more deeply into the facts with the result that it has been proved in succeeding actions by expert engineers and others that the operations of the very pumps involved in the Forbell case could not be felt even in the loose sandy soil of Long Island beyond a zone of influence with a radius of 1,300 to 3,500 feet. This resulted in the dismissal of many actions in which large damages were claimed.

In

Willis v. City of New York (N. Y. Law Journal,  
Nov. 9th, 1910)

the plaintiff brought suit for damages arising from the operation of the City's pumps the nearest of which were located 4,000 feet from the plaintiff's land.

Mr. Justice McCALL in rendering judgment dismissing the complaint, said :

" It requires more proof in causes of this character in my view of the situation, than the mere establishment of the fact that the city operates these plants and that there is a lowering or variation of the so-called 'water table' of plaintiff's premises, even if that fact be established, to find a warrant or a basis for judgment."

\* \* \* While the burden is rightfully upon the plaintiff to prove that the operation of the various stations was to such an extent, either operating singly or simultaneously, as to bring this plaintiff's land within their influence, to the end of taking *from* his land, or preventing the natural *flow* to his land, of water that was there, or should naturally come thereto, he, in my judgment, has not sustained same, but, on the contrary, it has been established from the testimony of experienced engineers, and with the tables of their experience in their tests given, that the maximum, as marking the zone of influence of these galleries, was 3,500 feet from the gallery or station (as to Wantagh). A fair and conservative acceptance of the zone of influence would fall far short of this when you, therefore, contemplate the facts and take into consideration the distances at which the various stations are located from plaintiff's land (set out above), and then couple with that the additional facts that on the territory from Watts Pond to Massapequa, inclusive, there are eight pumping stations, neither owned nor operated by the defendant, and that the nearest driven-well station to plaintiff's farm is owned and operated by the Village of Freeport, and that next in proximity to the farm is one operated at Rockville Centre, neither of which in any way controlled or operated by the defendant, it becomes well nigh impossible to find in the operation of defendant's stations a cause of injury to plaintiff's property. No occasion arises in this opinion for entering into any detailed analysis of this proof. It seems to be unanswerable and conclusive. It strikes

me to say in passing that the question of capillary rise of water in Long Island soils and its relation to surface moisture, in the light of Mr. Whipple's testimony in this case, is a very important factor to be considered in this and like cases, and with particular reference to his scientific opinion *that a water table situated at five feet from the top soil is of no benefit whatever in the growth of crops.* For the reasons advanced, which in my judgment show that the operation of these plants complained of could not possibly have been cause of injury to plaintiff's lands, judgment must be rendered dismissing the complaint."

In *Snow v. City of New York* and seven like cases where similar damage was claimed from the operation of these pumps, judgment was recently rendered for the City by the Supreme Court.

In the *Snow* case the defendant's pumps were located respectively 3,430 feet, 3,140 feet and 5,220 feet and 4,940 feet from plaintiff's properties. It was found by the Court that the maximum zone within which the influence of these pumps could be felt was 1,300 feet and that no damage had resulted to the plaintiff.

What a difference between fact and fancy. And so it is here. Hathorn claims that the defendant's pumps, the nearest of which is 4,800 feet distant, injure his spring notwithstanding that the Patterson, the Putnam, the Congress and other spring owners whose springs are all located within a radius of 300 feet of the Hathorn spring are daily and continuously pumping for the purposes of their respective mineral water businesses. If the influence of the powerful suction pumps of the City of New York drawing more than a million gallons of water daily for the water supply of the Borough of Brooklyn can not be felt for more than 3,500 feet through the sandy soil of Long Island, is it reasonable to suppose that these lift pumps of the Gas Company, drawing not for the water supply of a great municipality but for its private business, can affect through solid limestone rock the spring of the Hathorn's, 4,800 feet away.

As the record here permits of no argument of the facts we must content ourselves with statement that no injury results

to anyone from the defendant's operations. It is so alleged in the bill (Record, p. 9, par. V.) and for present purposes admitted by the demurrer in the record.

## VI.

### **The appeal is properly before this Court.**

The action is in equity to have a certain law of the State of New York declared unconstitutional and void as violative of the Constitution of the United States and to have the defendants enjoined from enforcing its provisions.

Upon the defendants several demurrers to the bill a final decree was entered sustaining the demurrer and dismissing the bill. From such decree the appeal is taken direct to this Court.

Such an appeal is provided for and allowed by Act of March 3, 1891, Ch. 517, 26 Stat. L., 826, which provides Section 5 :

"The appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases :

" 1. \* \* \*

" 2. \* \* \*

" 3. \* \* \*

" 4. In any case that involves the construction or application of the Constitution of the United States.

" 5. \* \* \*

" 6. In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

" 7. \* \* \* ."

See Hastings, Atty. Gen., v. Ames, 68 Fed. Rep., 726,

in which the Circuit Court of Appeals for the Eighth Circuit dismissed an appeal in a similar case upon the ground that the

appeal should have been taken direct to the Supreme Court of the United States. Later an appeal in that case was taken to and decided by this Court being reported.

*Smyth v. Ames*, 169 U. S., 466.

The decree entered upon the demurrers was final in form and effect. It dismissed the amended bill and left nothing further to be done, the cause to all intents and purposes and as to all defendants being thereby finally disposed of.

*Penn. Mutual Life Ins. Co. vs. Austin*, 168 U. S., 685.

That case is upon all fours with the case at bar as far as concerns the practice upon appeal and the right to appeal from a decree of dismissal entered upon demurrers.

There the action was commenced in the Circuit Court for the Western District of Texas. The bill filed attacked a part of the State of Texas, and certain municipal ordinances of the City of Austin, claiming them to be in contravention of the Constitution of the United States. The defendants demurred to the bill and the Circuit Court sustained the demurrers and entered a decree dismissing the bill. The complainant then appealed from such decree to this Court. Upon the appeal coming on to be heard the appellees moved for a dismissal, but this Court held that the decree being final in form and effect and the case involving constitutional questions, the appeal was properly taken under Act of March 3, 1891, Ch. 517, 26 Stat., 826, and proceeded to decide the case upon the merits.

Also,

*Loeb v. Columbia Township Trustees*, 179 U. S., 472-476, 477,

which was an action brought in the Circuit Court for the Southern District of Ohio, involving the validity of a state statute under the Constitution of the United States. The petition was demurred to and sustained and from the judgment entered a writ of error (the action being at law) was obtained to this Court. Objection was made to the jurisdiction of this Court to proceed upon a writ of error directly to the Circuit Court, but this Court overruled the objection holding the judgment final, and the case within the provisions of the Act of March 3, 1891, Chaps. 517-26, Stat. 826, and then pro-

ceeded to determine the appeal upon the merits incidentally reversing the judgment appealed from.

In

*Beasley v. Texas & Pacific Ry. Co.*, 191 U. S., 492, an appeal was taken to this Court from a decree of the Circuit Court of Appeals for the Fifth Circuit, dismissing a bill of complaint upon demurrer for want of equity. A motion made to dismiss the appeal upon the ground that the decree was not final in form was denied, the Court saying, page 494 :

"There is a motion to dismiss the appeal to this Court on the ground that the decree was not final in form, but the decisions are the other way, and the case being one in which the decree of the Circuit Court of Appeals can be reviewed in this Court under the Act of March 3, 1891, we have jurisdiction, and the motion must be overruled."

The finality of a decree entered upon a demurrer depends entirely upon whether anything substantial remains to be done under it or whether the decree itself determines the litigation. If leave to amend be given, or the case be remanded from the Circuit Court of Appeals, with instructions to the lower court to take further action, no appeal can be taken therefrom to this Court ; but, on the other hand, if the bill be dismissed and nothing further remains to be done, an appeal to this Court will lie.

*Bank of Rondout v. Smith*, 156 U. S., 330.

*Clark v. Kansas City*, 172 U. S., 334.

*Great W. Telegraph Co. v. Burnham*, 162 U. S., 339.

*Hill v. Chicago & Evanston R. Co.*, 140 U. S., 52.

*Jones v. Craig*, 127 U. S., 213.

*Elliott v. Sackett*, 108 U. S., 132-139.

*Forgay v. Conrad*, 6 How. (47 U. S.), 201.

The fact that the decree dismisses the bill with costs to be taxed, without stating the amount of the costs, does not prevent the decree from being final in all respects. This precise point was passed upon and so held in

*Fowler v. Hamil*, 139 U. S., 549.

*Silsby v. Foote*, 20 How. (U. S.), 290-295-6.



In conclusion of this lengthy brief will the court pardon the writer for any seeming warmth in discussion ; it has arisen from a deep interest in the result.

He feels that a great wrong has been done by the State of New York and by its courts which he earnestly hopes to see righted here. This struggling gas company, in which appellant and hundreds of others had invested their savings, just reaching business success after several years' bitter struggle to establish itself in the business world, is ruthlessly cut down and destroyed by State legislation instigated by its competitors with not one cent of compensation provided.

We respectfully submit the statute involved should be held unconstitutional and the decree of the Circuit Court should be reversed and the cause remanded with instructions to afford appellant relief accordingly.

ROBERT C. MORRIS,  
GUTHRIE B. PLANTE,  
Counsel for Appellant.

Office Supreme Court, U. S.  
FILED.

NOV 28 1910

JAMES H. McKENNEY,  
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

---

No. 260.

---

STUART LINDSLEY, APPELLANT,

vs.

NATURAL CARBONIC GAS COMPANY ET AL.

---

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

**PETITION OF NEW YORK CARBONIC ACID GAS  
COMPANY ET AL. FOR LEAVE TO FILE BRIEF  
AND TO PARTICIPATE IN THE ORAL ARGU-  
MENT OF ABOVE CAUSE; CONSENT OF AT-  
TORNEYS OF RECORD.**

---

EDGAR T. BRACKETT,  
*For Petitioners.*



IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

---

No. 260.

---

STUART LINDSLEY, APPELLANT,

*vs.*

NATURAL CARBONIC GAS COMPANY ET AL.,  
APPELLEES.

---

We hereby consent that an order be made by the court permitting The New York Carbonic Acid Gas Company, The Geysers Natural Gas Company, and The Lincoln Spring Company, with the permission of the court, to file a brief and participate in the argument upon the appeal of the above-named plaintiff herein, which is set down for argument by order of the court for November 28, 1910, said corporations named being situated similarly with the defendant Natural Carbonic Gas Company and having an interest in the decision of the questions raised by such appeal herein.

Dated OCTOBER 24, 1910.

ROBERT C. MORRIS,  
GUTHRIE B. PLANKE,  
*Counsel for Appellants.*

## IN THE SUPREME COURT OF THE UNITED STATES.

No. 260.

STUART LINDSLEY, *Appellant*,*vs.*NATURAL CARBONIC GAS COMPANY ET AL., *Appellees*.

We hereby consent that an order be made by the court permitting the New York Carbonic Acid Gas Company, The Geysers Natural Gas Company, and The Lincoln Spring Company, with the permission of the court, to file a brief and participate in the argument upon the appeal of the above-named plaintiff herein, which is set down for argument by order of the court for November 28, 1910.

Dated OCTOBER 24, 1910.

EDWARD R. O'MALLEY,

By NASH ROCKWOOD,

*Of Counsel,**Attorney for State of New York.*

NASH ROCKWOOD,

*Attorney for Appellees Hathorn and Others.**To the Supreme Court:*

The petition of the New York Carbonic Acid Gas Company, The Geysers Natural Gas Company, and the Lincoln Spring Company, respectfully, shows to this court:

That there is now on file in the records of the court the record on appeal in the action of Stuart Lindsley, appellant, against Natural Carbonic Gas Company, appellant, impleaded with others, appellees, and that the argument of said appeal has been set by the court for December 5, 1910.

Your petitioners further show that said appeal involves the constitutionality of the act of the legislature of the State of New York known as chapter 429 of the Laws of 1908,

which seeks to forbid pumping by the owners of springs extending into the rock, and producing mineral water and carbonic acid gas, for the purpose of extracting the gas and selling the same separate from the water; that three out of the four inhibitive provisions of the act were held unconstitutional by the Court of Appeals, but the fourth one, the provision before referred to, was sustained, and actions are pending against each of your petitioners, as well as against the Natural Carbonic Gas Company, one of the appellants in the Lindsley case, to enforce the provisions of said statute and to prevent the defendants therein from pumping.

That said act, if enforced, will practically ruin the business of your petitioners, and it is of the utmost importance to the protection of their rights that they should be allowed by counsel to file a brief on the questions that are common to them and to the Natural Carbonic Acid Gas Company; that annexed hereto are consents of the counsel for the appellants and for the appellees that your petitioners be permitted to file such brief and to participate in the argument; that your petitioners have caused a brief to be prepared and the same is now being printed and will be ready for the files of the court, as they believe, not later than the 30th inst.

Wherefore, your petitioners pray that an order may be made by the court permitting your petitioners, by counsel, to file a brief embodying their views on the questions in the Lindsley case that affect them, and, if possible without burden to the court, permitting their counsel to participate in the argument.

Dated NOVEMBER 25, 1910.

THE NEW YORK CARBONIC ACID GAS CO.,  
THE GEYSERS NATURAL GAS CO.,  
LINCOLN SPRING COMPANY,

By EDGAR T. BRACKETT,

*Counsel.*

STATE OF NEW YORK,  
*County of Saratoga, ss:*

Edgar T. Brackett, being duly sworn, says that he is the counsel for the petitioners named in the foregoing petition and authorized to represent such petitioners; that the matters of fact stated in said petition are true.

EDGAR T. BRACKETT.

Subscribed and sworn to before me this 25th day of November, 1910.

[SEAL.]

F. ANDREW HALL,  
*Notary Public.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

---

No. 260

---

Office Supreme Court, U. S.

FILED.

DEC 5 1910

JAMES H. MCKENNA, CLERK.

STUART LINDSLEY, APPELLANT,

*against*

NATURAL CARBONIC GAS COMPANY,

APPELLANT,

and WILLIAM S. JACKSON ET AL,

APPELLEES.

---

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF SUBMITTED BY LEAVE OF THE COURT  
ON BEHALF OF LINCOLN SPRING COM-  
PANY, NEW YORK CARBONIC ACID GAS  
COMPANY AND GEYSERS NATURAL GAS  
COMPANY, CORPORATIONS SITUATED SIMI-  
LARLY, WITH THE ABOVE NAMED NATUR-  
AL CARBONIC ACID GAS COMPANY, AND  
HAVING AN INTEREST IN THE QUESTIONS  
HERE PRESENTED.**

---

EDGAR T. BRACKETT,

*Counsel for the interests named.*





IN THE  
**SUPREME COURT**  
OF THE UNITED STATES.

---

STUART LINDSLEY,

Appellant,

— vs. —

NATURAL CARBONIC GAS  
COMPANY,

Appellant,

and William S. Jackson as Attorney General of the State of New York, James D. McNulty, William E. Woolley, George A. Farnham, William D. Ellis, James M. Andrews, Willard Lester, Charles C. Van Deusen, D. Peter McQueen, Spencer Trask, Henry S. Clement, Cornelius Sheehan, Israel Putnam, John Don, James H. Baker, Edward W. Kearney, Julius H. Caryl, Harry Crocker, William B. Gage, William B. Huestis, Douglas W. Mabey, Winsor B. French, Charles D. Thurber, Benjamin J. Goldsmith and William M. Hoes, individually and as members of the Citizens Committee in charge of the movement to restore the Saratoga Mineral Springs and the prestige of Saratoga Springs as a National Health Resort; and Frank H. Hathorn,

Appellees.

---

Brief submitted by leave of the Court on behalf of Lincoln Spring Company, New York Carbonic Acid Gas Company and Geysers Natural Gas Company, corporations situated similarly with the above named Natural Carbonic Acid Gas Company, and having an interest in the questions here presented.

The detailed history of the action above entitled is not necessary to be given in this brief, filed by interests not party to the record. It is set out in the brief of the plaintiff, appellant. It is enough to state that the record shows an appeal, allowed by the Court (pp. 26 and 27) from a judgment entered upon the allowance of a demurrer to the Bill (pp. 17 to 24) as insufficient and not stating a cause of action (p. 25) and that it involves the question whether a statute of the State of New York violates any provision of the Federal Constitution.

The intervenors in the argument, owning springs, engaged in the business of extracting from the water, compressing and selling natural carbonic acid gas, situated similarly with the appellant Natural Carbonic Gas Company, and vitally interested in the questions raised by this appeal, desire to present their views on the question of the unconstitutionality of the act by which it is sought to prevent the owners of springs extending into the rock, and which produce water charged with natural mineral salts and an excess of carbonic acid gas, from raising the water in their wells to the surface of the ground, by pumping.

May 20th, 1908, became a law of the State of New York, what is now Chapter 429 of the Statutes

of the State of that year. The Act is set out in full in the bill (pp. 10, 11 and 12 of record).

At the time this act became a law the appellant Natural Carbonic Acid Gas Company, and the three companies for which this brief is filed (Lincoln Spring Company, New York Carbonic Acid Gas Company and Geysers Natural Gas Company) were engaged in the business of pumping to the surface of the ground mineral water of the character described in the law, and there, after it had been pumped to the surface, extracting the gas, compressing it into liquid form, putting it into steel tubes, and marketing it,—it being useful in carbonating beverages, and in various other ways. The scene of the operations of these companies is from a mile, to two and a half miles, southerly of the Village of Saratoga Springs.

At once the law came into operation, a storm of litigation broke loose upon the persons thus pumping.

1st. Frank H. Hathorn and another, owners of a mineral spring situated in the Village, brought a suit in the Supreme Court of the State against the here appellant, Natural Carbonic Gas Company to enforce the provisions of the law, and to prevent the defendant from pumping.

2d. The People, by the Attorney General, brought separate actions for the same purpose against,—

- (a) Such appellant, Natural Carbonic Gas Co.
- (b) Lincoln Spring Co.
- (c) New York Carbonic Acid Gas Company.
- (d) Geysers Natural Gas Company.
- (e) Congress Spring Company.
- (f) Henry M. Levingston, Jr.
- (g) Augusta Patterson and others.

There were thus eight actions pending, all involving the same constitutional questions. Other actions have since followed.

In the Hathorn action a temporary injunction was granted at the Special Term, enjoining any pumping during the pendency of the action, the court sustaining the Act of the Legislature in all its parts; and like injunctions were thereafter granted in the several actions of the People, although the operation of all of the same was stayed pending an appeal. On appeal to the Appellate Division the lower court was affirmed in the Hathorn action, the Court sustaining the act fully, but was reversed in the People's action named, because the court above would not allow a defendant to be ruined by a temporary injunction where no security was given,—no security being required by the practice on the granting of an injunction where the People are plaintiffs.

The action of the Appellate Division on these appeals is reported at 128 App. Div. 33, 43.

An appeal to the Court of Appeals was then allowed, and taken, in the Hathorn action, where the temporary injunction was affirmed, (194 N. Y., 326 et seq.). The Court, Judge Hiscock writing, took up, separately, the four prohibitions of the Statute, and in sustaining the order below, held unconstitutional and void three of them, to wit: those provisions of the law under which the action was brought, that attempted to forbid accelerating, or increasing, the flow of percolating waters, or natural carbonic acid gas from wells bored into the rock, by pumping or any artificial contrivance whatever.

- (a) Absolutely and without qualifications.
- (b) When the result of so doing will be to im-

pair the natural flow or the quality of such water or gas in the spring or well of another person.

(c) The doing of any act whereby the flow or quality of the waters described, or of the carbonic acid gas, or other mineral ingredients therein in any spring or well is diminished. Each of these prohibitions was held void. (194 N. Y., 341, 342, 343.)

The fourth inhibitive provision, however,—the one prohibiting pumping when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same separate from the water, was upheld as valid, and the temporary injunction was sustained because of, and on, that single provision.

From a judgment of the majority of the Court Judge Haight dissented in an opinion (p. 351 et seq) and Chief Judge Cullen concurred only in the result.

Three out of the four prohibitory provisions of the Act having been thus held void on this preliminary appeal, the actions brought by the People presently came on for trial. The several answers of the defendants here represented admitted the fact of pumping for the purpose of extracting the gas and selling it separate from the water, and pleaded the unconstitutionality of the law under which the action was brought, and, upon the trials, the People rested upon that admission without offering any proof. The defendants then offered evidence that their pumping did not affect any other spring, and also evidence that pumping the character of water specified in the act from wells that did not extend into the rock had an equal effect in depleting the water and gas as did pumping from wells that did extend into the rock. The evidence on both points was excluded and, the defendants

resting, the court, out of deference to the opinion of the Court of Appeals in the Hathorn case, directed judgments in favor of the People and against the defendants, severally, in the actions against the New York Carbonic Acid Gas Company, The Geyser Natural Gas Company, the Lincoln Spring Company and the Natural Carbonic Gas Company, but dismissed the complaint in the actions against the Congress Spring Company, Augusta Patterson and Henry M. Levengston, Jr., because, while they, severally, pumped, it was not for the purpose of selling the gas separate from the water.

Appeals were then taken in the four cases where judgment had passed against the defendants, and an affirmance, *pro forma*, was had in the Appellate Division, one of the Justices not acting so as to leave the question fully open to the Court of Appeals.

Further appeal was then taken to the Court of Appeals and argument there had and the judgments rendered against the several defendants were reversed and a new trial ordered in each case. (196 N. Y., 421 et seq.)

Upon this appeal the Court held, Judge Gray writing, (p. 437) that a proper reading of the provisions of the act that forbids pumping for the purpose of extracting the gas and selling it separate from the water did not result in an unqualified prohibition of pumping, without reference to the reasonableness thereof, and that, therefore, the evidence offered by the defendants to show that their pumping did not affect other springs was competent, and that it was, therefore, error to refuse to receive it. It was also held (p. 438) that the defendants were entitled to show that pumping from wells that do not go into the rock had the

same effect upon the source of supply as did pumping of wells that do go into the rock, and that, if it was shown that the effect was the same in pumping both such classes of wells, then the Federal Constitution forbidding a state to deny the equal protection of the laws was violated. The question whether it was a violation of the provision of the Federal Constitution requiring the equal protection of the laws to permit wells that did not go into the rock to be pumped, while it forbade pumping those that did go into the rock, which was earnestly pressed upon the attention of the Court by the defendants, was, therefore, left to be determined as a matter of fact, on the trial. If the pumping of those wells that do not go into the rock, which is not forbidden by the act, is shown to be the same in effect on the supply of water and gas as is the pumping of those that do go into the rock, the pumping of which is forbidden by the act, then, as held by the Court, the Fourteenth Amendment of the Federal Constitution is violated, and the single remaining provision of the law is unconstitutional and void.

By their pleadings in these actions, as before said, the several defendants had admitted (as of course with any regard for truth they had to admit), their corporate existence; that mineral water of the character specified in the law was underlying the ground at the point in question, which waters had long been used and sold as remedial agents and were of value in the treatment of diseases, and celebrated as such; that there were large hotels for the entertainment of visitors in Saratoga Springs; that the defendants, severally, owned land under the surface of which large quantities



of this water and gas existed; and that they did pump the water from wells extending into the rock, for the purpose of extracting therefrom the gas and vending it for commercial purposes. They admitted also the passage of the act as alleged in the complaint. They specifically and in terms denied that their wells were connected by courses or channels with any other mineral springs, or were dependent upon the same source of supply as other springs in the town; denied that they had in any way produced an unnatural flow of the waters or gas from their wells; that they had affected any other spring or damaged any one, and denied that the amount they used was in excess of the amount which, in the reasonable use of their properties, they had a right to pump. (See 196 N. Y. pp. 423, 424, 425, as to contents of pleadings). Under these admissions and denials it was held by the Court (196 N. Y., 421, 439, 440) that the burden of proof was placed by the act upon the defendants, and that they were required in defense to establish "that the statutory provisions were inapplicable to them; that such regulations were unjustly discriminative, or that they were not chargeable with making a use of their property which was unreasonable because injurious to the rights of others." (pp. 439, 440).

Chief Judge Cullen, (p. 440 et seq.) in a concurring opinion, maintained that the Legislature cannot require an owner to use his property for the benefit of the public, nor restrain him from devoting it to such purposes as he sees fit, even wasting, providing he does not conflict with the rights of others.

In the meantime, the case at bar had been

brought by the appellant Lindsley, a stockholder of the Natural Carbonic Gas Company residing in the State of New Jersey, to restrain the prosecution of the company under the Act in question, on the ground that it was unconstitutional and void. The various steps taken in that action are, as before said, recited in the brief of the appellant in the record, and have resulted in reaching this Court on the present argument.

The order appealed from should be reversed, and the statute in question, Chapter 429 of the Laws of 1908, of the State of New York, should be declared unconstitutional and void.

## I

The matter is one of which the Federal Courts have jurisdiction apart from the diverse citizenship of the parties, for the reason that it involves a construction of a provision of the Federal Constitution.

Press Pub. Co. v. Monroe, 164 U. S., 105, 110.

Pope v. Louisville, &c., 173 U. S., 573, 576.

I suspect that there will be no challenge of this proposition, and it needs no elaboration.

## II

The one present remaining feature of the act, the one held constitutional by the Court of Appeals, and upon which the whole contention of the

Appellees must now hang,—that provision which forbids the pumping of mineral water charged with natural mineral salts and an excess of carbonic acid gas for the purpose of extracting, collecting, compressing, liquefying, or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated,—this provision violates the Fourteenth Amendment to the Federal Constitution, in that it denies to the equal protection of the laws, and is void for that reason.

To review a moment, section 1 of the act in question, as construed, (194 N. Y., 341, 342, 343) forbids pumping of the mineral water from wells extending into the rock.

1st: Absolutely. This provision was held void by the Court of Appeals.

2nd: When, by reason thereof, the natural flow from any mineral spring or mineral well belonging to any other person or corporation is impeded, retarded, diminished, diverted or endangered, or the quality of its waters impaired, or the quantity of its natural carbonic acid gas, or mineral ingredients, diminished. This was also held void.

3rd. For the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated. This provision was sustained as valid.

4th. The doing of any act whereby the natural flow from any spring is impeded, retarded, diminished, diverted or endangered, or the quality

of its waters is impaired, or the quantity of its carbonic acid gas, or mineral ingredients, is diminished. This was held void.

Our discussion then is only as to the provision sustained by the State Court, the others being as though never in the act and beyond consideration here.

The Fourteenth Amendment to the Federal Constitution, so far as it bears on this controversy, reads, "nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

As construed by the State Court, the pumping of the wells or springs in question, for the purpose of extracting, collecting, liquefying and vending the gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it is associated, is forbidden and declared unlawful, while pumping such wells for any other purpose, for bottling, or barreling, or piping, or tanking, or wasting, is wholly without prohibition and unaffected.

It will be remembered that until the water reaches the surface of the ground the acts of those pumping to extract the gas, and of those pumping for any other purpose, are identical. After the water gets to the surface, after the pumping is done, the gas is separated, or the water bottled, or otherwise used. But in either case the water is brought to the surface in the same way—by pumps.

The three provisions named being held unconstitutional and void, the Act remains as though

they had never been inserted in it,—as though the inhibition held valid was the only one originally contained therein.

Until the Hathorn case reached the Court of Appeals there could be no argument of inequality made, in that persons were permitted to pump for the purpose of bottling the water, while they were forbidden to pump for the purpose of selling the gas separated from the water; because, by the act, as there previously sustained, all pumping was forbidden alike, and there was no inequality in the inhibitions, but when the Court of Appeals held that all of the other prohibitory provisions of the act were unconstitutional and void, and that pumping could be done except where the purpose was to sell the gas separate from the water, then the inequality of the act first arose and could be presented. The instant that decision was made the question of inequality here raised first became forceful, because, from that moment, notwithstanding the attempt of the act to prohibit all pumping and the decisions of the lower courts holding that all pumping was prohibited, pumping for the purpose of bottling, or barreling or wasting was permitted precisely as though no prohibition thereof had ever been in the act at all.

In scrutinizing the constitutionality of the provision of the act the first inquiry must be “What ‘was the object of its passage?’”

As to this there can be neither doubt, nor question. The title of the Act itself declares the purpose of the legislation. It is “An Act for the protection of the natural mineral springs of the State and to prevent waste and impairment of ‘its natural mineral waters.’”

We have a right to go to the title in searching for the legislative intent.

Bell v. Mayor, 105 N. Y., 139, 144.

Its only defensible purpose is thus declared in its title, and is to prevent the waste and impairment of the mineral water and gas. The pumping of these wells is not detrimental to health, nor to morals, nor to public safety. There is nothing noxious, nor unhealthful, nor degrading in, nor about, the work. It is clean and wholesome. Except it may deplete a common source of supply, the exercise of the police power with respect to it is wholly unwarranted. Aside from the impairment of the water and gas, if there is any such impairment, the business of the companies engaged in pumping the water and selling the gas separate from the water is wholly innocent and innocuous.

The purpose of the act, therefore, being to prevent waste and impairment of the mineral water and gas, it was not competent for the legislature to say that a person having such a well should not be permitted to pump it for the purpose of extracting the gas therefrom, and selling it, while another person, possessing an other such well of precisely the same character, is permitted to pump without restraint or limit, for any purpose other than the extraction of the gas and its sale separate from the water.

The question presented is one of which the Court must take judicial notice. A gallon of this mineral water, precisely as other water, displaces a certain space, for whatever purpose it may be used after the taking, and it always must. No proof is required to show that the pumping of one

hundred gallons of the water for the purpose of extracting the gas therefrom, is no more a depleting of the water and gas, or their source of supply, than is the pumping of a like quantity of water for the purpose of bottling, or of wasting it upon the ground, without bottling at all. A gallon is a gallon. If a gallon of water displaces a cubic foot of space, it displaces it under any and all conditions. A cubic foot of water fills just so much of space, and, when removed, by pumping or other means, it leaves so much of a void.

The result of the pumping, therefore, being the same whether, in the one case the gas is to be extracted and sold separate from the water, or, in the other, the water is to be bottled and used in any other way, the prohibition of pumping for the purpose of extracting the gas, without prohibiting the pumping for any other purpose, such other purpose having an equal and like effect upon the water and gas and the source of supply thereof, deprives the defendant of the equal protection of the laws, and constitutes a violation of the Fourteenth Amendment, which forbids such denial of equal protection. The company engaged in pumping the water and extracting the gas therefrom and selling the same separate from the water is prohibited from doing something (pumping) which its neighbor is permitted to do, when the effect of pumping by the one is precisely the same as the pumping by the other. These companies, as before said, engaged in an entirely innocent business, one that is not detrimental to health, nor morals, nor the public safety, find their business stricken down by this provision of the law, and ruined, while their neighbors, engaged in pump-

ing the same waters and gas for the purpose of bottling it, or any other purpose than extracting the gas therefrom,—doing precisely the same thing with the water until it reaches the surface of the ground as do these companies, and equally depleting the water and gas,—are left without any restraint against pumping whatever.

It is precisely such result that the prohibition of the Federal Constitution here invoked was intended to prevent. The laws must bear equally upon all and no person, because of the color of his skin, the denomination of his church, the amount of his wealth, the source of his ancestry, can be selected for ruin, while others doing the same things he has been doing are left untouched and unpunished.

The wise power that incorporated this amendment into the Federal Constitution knew full well the infirmity of human nature and, too, the temptations to which legislatures in the different states are exposed. Men of extraordinary wealth, of extraordinary popularity, men uniting, perhaps, the two, would appeal for some immunity, for some privilege, which the less wealthy, the less popular neighbor would not have, and could not get and, therefore, this 14th amendment was provided to prevent any such result. The unpopular, who can get nothing from the legislature, must be treated exactly like the popular, who can get everything. What is done to one person must be done to another like situated, and no man, nor set of men, shall be singled out for discrimination, shall be prohibited from doing certain things, while all others are permitted to do them. What is prescribed for one must be the rule for all under



the same conditions and circumstances. Laws shall not be so framed as to limit the activity, or restrict the earnings, of one man, unless it limits the activity and restricts the earnings of all men situated under like conditions and in like territory.

The amendment itself is about as plain as our English language can phrase it, and cannot be much elucidated, but there are decisions construing it.

Of course, a corporation is a person within the meaning of this constitutional provision.

*Pembina &c. v. Pennsylvania*, 125 U. S., 181.

While the state has undoubtedly the power by appropriate legislation to protect the public morals, and public health, and the public safety, if the necessary operation of the laws attempting it is to amount to a denial to persons within its jurisdiction, of the equal protection of the laws, such laws must be deemed unconstitutional and void.

*Dobbins v. Los Angeles*, 195 U. S., 223.

This amendment of the constitution prohibits discriminating and partial enactments, favoring some to the impairment of rights of others; the principal, if not the sole, object of its prohibition being to prevent any arbitrary invasion by state authority of the rights of persons, or property, and to secure to every one the right to pursue his happiness unrestrained, except by just, equal and impartial laws.

*Butchers Union Co. v. Crescent City*, 111 U. S., 746.

Thus, a Pennsylvania statute imposing a tax of three cents a day, upon the employers of foreign labor and authorizing it to be taken from such laborers wages, was held to violate this amendment.

*Frasier v. McConway & Torley Co.*, 82 Fed. Rep., 257.

Even if the law is fair on its face, and impartial in appearance, yet if it is applied and administered with an evil eye and unequal hand, so as to make unjust and illegal discrimination, it is within the prohibition of the Federal Constitution.

*Chy Lung v. Freeman*, 92 U. S., 275.

*R. R. Co. v. Bd. Equalizers*, 85 Fed. Rep., 302-17.

This amendment means that no person, or class of persons, shall be denied the same protection of the law which is enjoyed by other persons, or other classes, in the same place, and under like circumstances.

*Bowman v. Lewis*, 101 U. S., 22.

An assessment of the property of one person at full value, while that of others is at but a per cent of its value, contravenes this provision.

*R. R. v. Board &c.*, 85 Fed. Rep., 302, 317.

Now, when two persons are found alike pumping water of the character in question, if a law says that one of them must stop and the other not, it denies equal protection and is as flagrant a violation of the constitutional provision as any case we have cited, or as any case can be.

If it is said that there is no proof that any water

is ever pumped except to extract the gas, and, therefore, no inequality is shown, the answer is that the act must be judged, not by what is done under, it but by what may be.

Stuart v. Palmer, 74 N. Y., 183, 188.

G'iman v. Tucker, 128 N. Y., 190, 200.

Coxe v. State, 144 N. Y., 396, 408.

Colon v. Lisk, 153 N. Y., 188, 194, 195.

So, as any one may begin to pump for the purpose of bottling, even if it never has been done before, the law must be judged by that possibility.

In all this there is no argument, nor suggestion, against the power and the right of a state to classify, and to frame legislation based on such classification. This fourteenth amendment withholds from the state no such power as that, but a classification must always rest upon some difference between the classes, bearing a reasonable and just relation to the act in respect to which the classification is proposed, and it can never be made arbitrarily and without regard to such relation.

In order to judge of what is a proper classification, in testing the validity of any law under this constitutional provision, it is always necessary to bear in mind the end sought to be attained by the act, and what may be a reasonable and a proper classification for one purpose may not be for another. For example, it is entirely proper and constitutional to say that the right of suffrage shall extend only to those who are twenty-one years of age. The manifest object of this provision is to secure a certain maturity of judgment before the right of franchise shall be exer-

cised, but, certainly since the passage of the fourteenth amendment, it is impossible for any state to say that the right of franchise shall be exercised only by white persons over twenty-one years of age, for that is precisely what was intended to be prevented by the provision, because the color of a man's skin bears no proper relation to the exercise of the franchise.

It is equally impossible, under this provision of the constitution, to say that no person under twenty-one years of age shall inherit property, because no maturity of judgment is required to inherit property, and, while the twenty-one years classification entirely proper for the exercise of the franchise, because it bears a reasonable relation to the object sought, it is not proper for the inheritance of property, because no maturity of judgment is required for such inheritance, and therefore, it bears no just relation to the classification proper in such case.

It will not do to say that only those living in brick houses shall have the right to vote. The house in which one lives bears no relation to the qualifications necessary for the franchise. It may be proper to say that no one, except living in a brick house, shall have more than five gallons of gasoline in the house at one time, because the non-inflammable character of a brick house has some bearing on the propriety of storing a thing as inflammable as gasoline.

It will not do to say that,—the inhabitants on both sides now sewerage into the Potomac River,—hereafter those living on its north side may do so. The object of such legislation being to prevent fouling the stream, it is not competent to prevent

the one-half of those living along the bank from thus draining, while the others are permitted to continue the pollution.

A multitude of examples will suggest themselves.

To repeat, the classification, to be sustained, must always bear a reasonable relation to the object sought to be attained by the law, and if it does not do so, the courts will instantly declare it void.

In *Railway v. Ellis*, 165 U. S., 150, 155, the State of Texas had sought to impose a ten dollar attorney's fee in certain actions against railroad companies, but against no one else. The Court says, "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorneys fees of parties successfully suing them, and all black men not it may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis."

Judge Brewer then cites and quotes with approval from these cases:

State v. Loomis, 115 Mo. 307, 314, which says,  
 " Classification for legislative purposes must  
 ' have some reasonable basis upon which to stand.  
 ' It must be evident that differences which would  
 ' serve for a classification for some purposes, fur  
 ' nish no reason whatever for a classification for  
 ' legislative purposes. The difference which will  
 ' support class legislation must be such as, in the  
 ' nature of things, furnish a reasonable basis for  
 ' separate laws and regulations. Thus, the leg-  
 ' islature may fix the age at which persons shall  
 ' be deemed competent to contract for themselves,  
 ' but no one will claim that competency to con-  
 ' tract can be made to depend upon statute or  
 ' color of the hair. Such a classification for such  
 ' a purpose would be arbitrary, and a piece of leg-  
 ' islative despotism, and therefor not the law of  
 ' the land."

Van Zant v. Waddell, 2 Yerger, 260, 270,  
 " Every partial or private law which directly pro-  
 ' posed to destroy, or affect, individual rights, or  
 ' does the same thing by affording remedies lead-  
 ' ing to similar consequences, is unconstitutional  
 ' and void. Were this otherwise, odious individuals  
 ' and corporate bodies would be governed by one  
 ' rule, and the mass of the community who made  
 ' the law by another."

Dibrell v. Morris Heirs, 15 S. W. Rep. 87, 95,  
 " We conclude, upon a review of the cases referred  
 ' to above, that whether a statute be public or pri-  
 ' vate, general or special, in form, if it attempts to  
 ' create distinctions and classifications between the  
 ' citizens of this state, the basis of such classifica-  
 ' tion must be natural, and not arbitrary."

Judge Brewer further adds (pp. 156, 157) "It is of course, proper that every debtor should pay his debts and there must be no impropriety in giving to every successful suitor, attorneys fees. Such a provision would bear a reasonable relation to the delinquency of the debtor and would certainly create no inequality of right, or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts while another is permitted to become, in like manner, delinquent, without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance, than in the other."

This Ellis case is submitted as a complete brief for the contention of the appellants here.

In *People v. Van De Carr*, 91 App. Div. 20, 29 the statute forbidding pictures of the flag for advertising, but allowing book sellers and jewelers to use it, was held void as class legislation and denying the equal protection of the laws. The case was affirmed in 178 N. Y., 425.

In *People v. Zimmerman*, 102 App. Div., 103, 105, 106, 111 et seq. where the statute forbidding the issuing of trading stamps unless there was printed legibly thereon a statement that they were redeemable in money, was held void, because it was really class legislation against a successful competitor, although it purported to be solely for the general good.

To these cases cited should be added, as covering the case at bar in principle, *Barbier v. Connolly*, 113 U. S., 27, 31; *Matter of Pell*, 171 N. Y., 47, 57; *Connolly v. Union S. P. Co.* 184 U. S. 540, where was held void an Illinois statute prohibiting

combination to prevent competition, because it excepted from its operations persons or associations or agriculturists and raisers of live stock.

The case of *Cotting v. Kansas*, 183 U. S. 79, 102 particularly illustrates the principle contended for. There the State of Kansas had passed an act that a stock yard doing a certain volume of business should pay a tax, while others not reaching the required volume were not required to do so. The court said that the amount of business done by a stock yard was not a proper classification on which to base a distinction between those upon whom taxes should be levied and those upon whom they should not.

As further authorities to the proposition, if any be needed, see

*Yick Wo v. Hopkins*, 118 U. S. 356, 367.

*Hays v. Missouri*, 120 id. 68, 70.

*Ritchie v. People*, 155, Ill, 98, 105.

*Millett v. People*, 117 id. 294.

*Frorer v. People*, 141 id. 171.

*Ramsey v. People*, 142 id. 380.

I have thus gone at length into these cases cited to place distinctly before the court the proposition that the requirement of classification is that the classification must be reasonable and scientific, and have some relation to the object sought by the legislature.

Having in mind these requirements, let us now clearly get in mind the class doing the acts against which this legislation is directed.

As before seen, the object of the legislation is to prevent the depletion of the gas and water by pumping and nothing else, and it can be nothing else. It comes, therefore, beyond question, that the only

2  
3



classification that can be attempted, the only class that can be constituted, must be one composed of the persons who are doing the pumping claimed to be injurious. There are persons exhausting this mineral water by pumping—they must all be put in one class and stopped, or none.

Having thus found the class in any attempted legislation on the subject, all the persons who are doing the act complained of must be put in the class, and if any one is restricted in his operations, all of the class must be.

The object being here to prevent the depletion of the mineral water and the gas, any classification attempted must have some relation to those who are engaged in the depletion. If the acts of two different persons are equally detrimental to the gas and the water and its source of supply, the law cannot say that one of such persons shall stop, and the other be permitted to go on. It must stop all or none. The legislature could not say, by the act in question, that one person pumping one hundred thousand gallons of water a day for the purpose of barreling it, and another a like quantity for the purpose of extracting the gas and selling it separate from the water, that one of these must stop and the other be permitted to go on, because the acts of each are equally harmful, if harmful at all; nor could it leave the situation where one desiring to bottle, or desiring simply to waste by casting the water upon the ground, may pump one hundred and fifty thousand gallons a day, or an unlimited quantity, while one desiring a little natural, pure carbonic acid gas may not pump a gallon.

Yet, as the law stands now, as construed by the Court of Appeals, precisely that is the situation. A person having one of these wells may pump any

quantity of the water, may deplete the sources of water and gas to any degree, providing only that he does not do it for the entirely harmless purpose (even from the standpoint of the Appellees, harmless after the pumping is done) of separating the gas and selling it, while one thus pumping a pint to extract the gas and sell it separate from the water, is made a criminal.

Such a condition is intolerable and in the teeth of the constitutional provision.

It is attempted to answer this reasoning by saying that all persons are forbidden to pump for the purpose of extracting the gas, and, therefore, there is neither inequality, nor discrimination. It is as if said in the case supposed, all living north of the Potomac were forbidden to sewer into the river. That is all of a part who are doing the evil act (if evil it is) are forbidden longer to do it, whereas the constitutional provision requires that all of all who do it shall be prohibited, if any are.

This contention of the Appellees ignores all the cases before cited and all that the courts have held as to classification. True all who pump for the purpose of extracting the gas are forbidden, but not all who pump and thereby deplete. The prevention of depleting being the object sought by the legislation, all who deplete by pumping constitute the class that must be stopped,—not a part who are pumping for a particular purpose. The class must be those who deplete, who pump, and all of them. So this suggestion answers not at all.

The other attempted answer has been, I suppose will be here,—that, irrespective of the statute, no one has a right to pump beyond a reasonable amount from a common source of supply, and that forbidding pumping, therefore, takes away no prop-

erty right, because, as construed by the Court of Appeals, pumping for the purpose of extracting gas, is not absolutely forbidden, but only if it affects injuriously some one else.

It is curious to note the successive processes by which these Gas Companies are to be stripped of their properties, if the Appellees here succeed in their contention.

For many years the law of New York was,—had always been—that an owner of land might pump from waters under his land to any degree, no matter who was injured. The courts had so held in repeated cases, from

Ellis v. Duncan, 21 Barb. 230, in 1855, to  
Bloodgood v. Ayers, 108 N. Y., 400, in  
1888.

The boys in the law schools were taught it as a fundamental.

A person purchasing land, under which was water, percolating or running in undefined courses, had the right attaching to his ownership to pump that water to an unlimited amount, under the law as it existed, as it had been uniformly interpreted.\* He had a right to purchase with that understanding; he could agree upon the purchase price in reliance upon that holding of the courts.

Such right of pumping was, indisputably, a property right.

Forster v. Scott, 136 N. Y. 577.

The right of pumping being a property right, it could not be taken away from the owner without compensation. The original attack on the law was on the ground that it took property without compensation. Had the legislature of the State then passed the law here under scrutiny, it would

instantly have been condemned as authorizing the taking of property without compensation, and therefore, void. And the property owner could rest,—perhaps, as the result of this litigation thus far shown, not could rest, but did rest,—secure in the belief that the Constitution and the laws protected him in the ownership of his property, including his right to pump to an unlimited degree.

But in the year 1900, to save what was deemed a harsh result in the particular case considered, the Court of Appeals held that damages might be collected for injury to a market garden, which had been ruined by extraordinary pumping by the city.

*Forbell v. New York*, 164 N. Y., 522.

Judge Landon says, in the opinion of the court written by him, (p. 527) "We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice." Reviewing many of the cases, stating that they denied liability for underground pumping, no matter how extensive, he adds, "We do not intend to impair their applicability to like cases, but there are features of this case to which these reasons do not apply," and he points out the distinctions. As distinctions they were not great, nor many, and reference is made to them only to show that the court did make them as distinctions, and did not mean by this *Forbell* case to overturn the established law of the years. Notwithstanding which, the *Forbell* case has been here invoked, and thus far successfully, as authority for the proposition that, from the deliverance of the court in that case, the law of the correlative use of underground waters has become a part of the jurisprudence of the State,—and it was applied against us in the decision of the *Hathorn* case.

So it comes that, without the intervention of any statute, at a time when, if the legislature had passed a statute it would have been denounced by the court as unconstitutional, with no evidence of intention anywhere to change the rule of a century as to the property right of pumping underground water,—the decision of the Court of Appeals in the Forbell case, although it expressly says that it did not intend to impair the ancient doctrine, is seized upon in deciding the cases here represented, as authority for the proposition that the rule has been changed and the companies divested of their property rights without compensation; a property right then existing, a property right which they had purchased with the purchase of their lands, a right upon the unchallenged existence of which they had invested large sums of money,—this right is taken away and they are ruined. The rule of a century has been changed, changed only by the Court, if at all, and because of such change these defendants are despoiled of their property.

If this is the final result, well may their stockholders exclaim with the great apostle to the Gentiles, "I am of all men the most miserable." If this is the final result, a new method has been discovered of taking property without compensation, and yet without violating the constitutional guaranty, because the Federal Constitution does not prohibit the State court from changing its previous construction of the common law.

It is useless now to find fault with the conclusion reached by the very learned highest court of the state in reaching the result that the prohibition of the statute against pumping for the purpose of extracting the gas is not absolute. It must, with great respect for that very learned court, be said

that such a holding does violence to the plainest of language. If in our common English tongue can be framed an absolute prohibition it is done here. "Pumping \* \* \* for the purpose of extracting, 'collecting, compressing, liquefying, or vending 'such gas \* \* \* is hereby declared to be unlawful." What warrant is there, can there be, for saying that this language does not absolutely prohibit pumping, but does prohibit pumping more than a reasonable amount. Just how could the verbiage be changed to make it absolute? The court held the first prohibition of the section, phrased in exactly the same language, an absolute one and void.

I cannot think such a construction a reasonable one but, being the construction of the highest court of the state, as to the meaning and force of a state statute I suppose that it must be accepted here.

But admit, and apply to the full, the doctrine of correlative use, accept the court's construction, that, under this absolute inhibition, we may still pump a reasonable amount,—our full share,—from the common source, if the source is common, the situation is still not saved to the appellees. The Court of Appeals holds that, by the act, the burden is put upon these defendants to show that they do not affect any one else, that they are "not chargeable with making a use of their property which 'was unreasonable, because injurious to the rights of others," (196 N. Y., 439, 440.)

Prior to the passage of this law, if Mr. Hathorn, if any one, brought suit against these defendants for pumping their wells, to the detriment of the complainant, he (the plaintiff) had to show, to meet the positive burden of showing, that there is

a common source of supply and that such pumping did injure him,—did hurt his well,—did secure to the one pumping more than his reasonable share of the water and gas. But, as thus construed by the Court of Appeals, after the passage of this act, when such a suit is brought against one of these corporations for pumping from a well extending into the rock for the purpose of extracting the gas, and by such pumping injuring some other well, the defendant must assume the burden, must itself affirmatively show that there is no common source of supply, or that it is not getting more than its fair share, and unless, and until, it can show one of these, judgment must pass against him on the presumption of guilt. If this must be done when it is attempted to enforce the act in one way, it follows that it must when it is attempted to enforce it in any other way prescribed by the act. Such a holding is and must be, that the act changes the burden of proof, whenever it is sought to enforce its provisions.

When we come to reflect, the result of this holding is somewhat startling.

A person thus pumping, by the terms of the Act, is subject to these proceedings:

(a) To be sued and restrained by any taxpayer (See Act, sec. 2).

(b) The Attorney General may, at any time, bring an action to restrain him from pumping, in the name of the People of the State, although they, the People, have not a penny's worth of proprietary interest in any spring injuriously affected,—thus putting him at the disadvantage of litigation with the tremendous power and resources of the State. (Sec. 3.)

(c) Upon request of taxpayers assessed for at

least \$10,000. in the aggregate, who indemnify, not the defendant but, the State, against costs, the Attorney General must bring such an action. (Section 3.)

(d) In any such action brought by the People, no security is required to be given on the granting of an injunction (New York Code of Civil Procedure, Sec. 1990). His business may be ruined by a preliminary injunction, even though he finally succeeds on the trial, and he has no redress.

(e) He is not permitted to decline to answer any question put to him upon the ground that answering might tend to convict him of crime. (Section 4.)

(f) He is made guilty of a crime. Section 1 of the Act, Chapter 429, Laws 1908, declares pumping for the purpose of extracting the gas, unlawful. Sections 2 and 3 refer to such pumping as unlawful. No specific penalty or punishment is, however, fixed for the crime of violating such prohibitions. Under such circumstances, the penal law of the State defines the crime and fixes its punishment. Section 29 of the New York Penal Law (Birdseye's Cumming & Gilbert's Consolidated Laws of New York, Annotated, Vol. III, page 3758) reads: "Where the performance of any act is prohibited 'by a statute, and no penalty for the violation of 'such statute is imposed in any statute, the doing 'of such act is a misdemeanor." This section was, at the time of the passage of the act (Chap. 429, Laws 1908) section 155 of the Penal Code, but, on the adoption of the Consolidated Laws, which became effective February 17, 1909, it was inserted in the Penal Law and numbered as before stated.

By Section 1937 of the same Penal Law (Birdseye's, Cumming & Gilbert's Consolidated Laws of



New York, Vol. III, page 4064) "A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

Place then in juxtaposition two men, each owning a spring in the Town of Saratoga Springs, both of which springs extend into the rock and produce water charged with natural mineral salts and an excess of carbonic acid gas,—one engaged in pumping his spring for the purpose of bottling the water, the other engaged in pumping his to precisely the same amount, for the purpose, after it has reached the surface, of extracting from the water the gas, compressing it, and marketing it. Pumping the same volume of water, each of necessity diminishes the water in the ground, and exhausts the source of supply of the water and gas, equally with the other. Each offends in like degree so far as exhausting the water and gas. The one pumping for the purpose of bottling is not a criminal, and he cannot be prevented from pumping unless it is affirmatively shown against him that by his operations he injures some other spring. And no matter how much he injures any other, he cannot be stopped in his work except by an action for an injunction, at the suit of the owner injured.

But the one pumping for the purpose of extracting the gas, and doing no more damage by his pumping than his neighbor, may be sued, not only by an owner injured by the pumping but by any taxpayer, by the Attorney General for the People;

he may be temporarily restrained without any indemnity in case he finally succeeds, and he is made a criminal, subject to imprisonment in the penitentiary for a year and a fine of \$500. If he is so unfortunate as not to have the \$500 in addition to his year he must spend five hundred more days in the penitentiary working out his fine, (New York Code Criminal Procedure, Secs. 484 and 718.)

And in all these situations he is saddled with the unnatural burden of affirmatively proving himself not guilty.

Take the question of the burden of proof in a civil action brought against him by any one authorized by the statute to maintain the same. When we reflect that this burden which he must assume is one relating to something going on some hundreds of feet under the ground, not capable of exact demonstration either way, is left almost, if not entirely, to the guesses of experts, we see the enormous handicap and disadvantage under which he labors, compared with a situation where such burden is left upon the party having the affirmative.

Take it if he is arraigned for a misdemeanor. He must, in truth, admit, as we admitted in the People's actions hereinbefore referred to, that he has pumped for the purpose of extracting the gas. Having done so, he is presumed to have injured some other spring and so is presumed guilty of a crime. So the Anglo Saxon doctrine of presumed innocence until guilt is shown is thrown to the winds, and he must affirmatively prove himself not guilty.

It may be that this can be done, that the burden of proof may be placed upon the de-

fendant in all criminal cases, although it would come perilously near despotism, but we are not now dealing with the question whether this is due process of law, or would be if it applied equally to all persons in the same situation, whether the burden can be shifted as to every one so that a defendant must affirmatively prove himself innocent, but are dealing solely with the question of the inequality of thus shifting the burden as to some doing a certain act and not shifting it as to others doing the same thing,—whether, if done as to any, it must not be done to all under like conditions.

The unequal shifting of the burden of proof violates the constitution equally with (oftentimes much more than) the imposition of an unequal tax, or any money burden.

The question of the burden of proof in a litigation is a substantial one. A mistake in determining where it lies is reversible error. It is so in a civil action.

*Millerd v. Thorn*, 56 N. Y., 402, 405.

*Murray v. Ins. Co.*, 85 N. Y., 236, 238, 239.

It is so in a criminal trial.

*Stokes v. People*, 53 N. Y., 164, 183.

*People v. Riordan*, 117 N. Y., 71, 73, 74.

It is so always. The unequal placing of the burden of proof is, therefore, the unequal placing of a very positive burden, a burden as great (usually much greater than) as the unequal imposition of fines for a general offense and it follows that any statute that, as construed by the State Court of last resort, thus does unequally place it, hopelessly offends against the constitutional provision we have been considering.

If the foregoing argument is right, the remaining provision of the statute in question should be held void.

Saratoga Springs, N. Y., November 26, 1910.

EDGAR T. BRACKETT,  
Counsel for the interests named, not parties to the  
record.



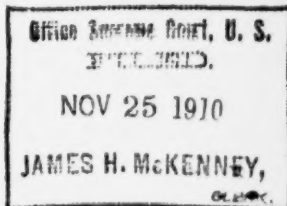
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1910.

---

No. 260.

---

STUART LINDSLEY,  
APPELLANT,  
vs.



NATURAL CARBONIC GAS COMPANY,  
JAMES D. McNULTY, AND OTHERS,

APPELLEES.

---

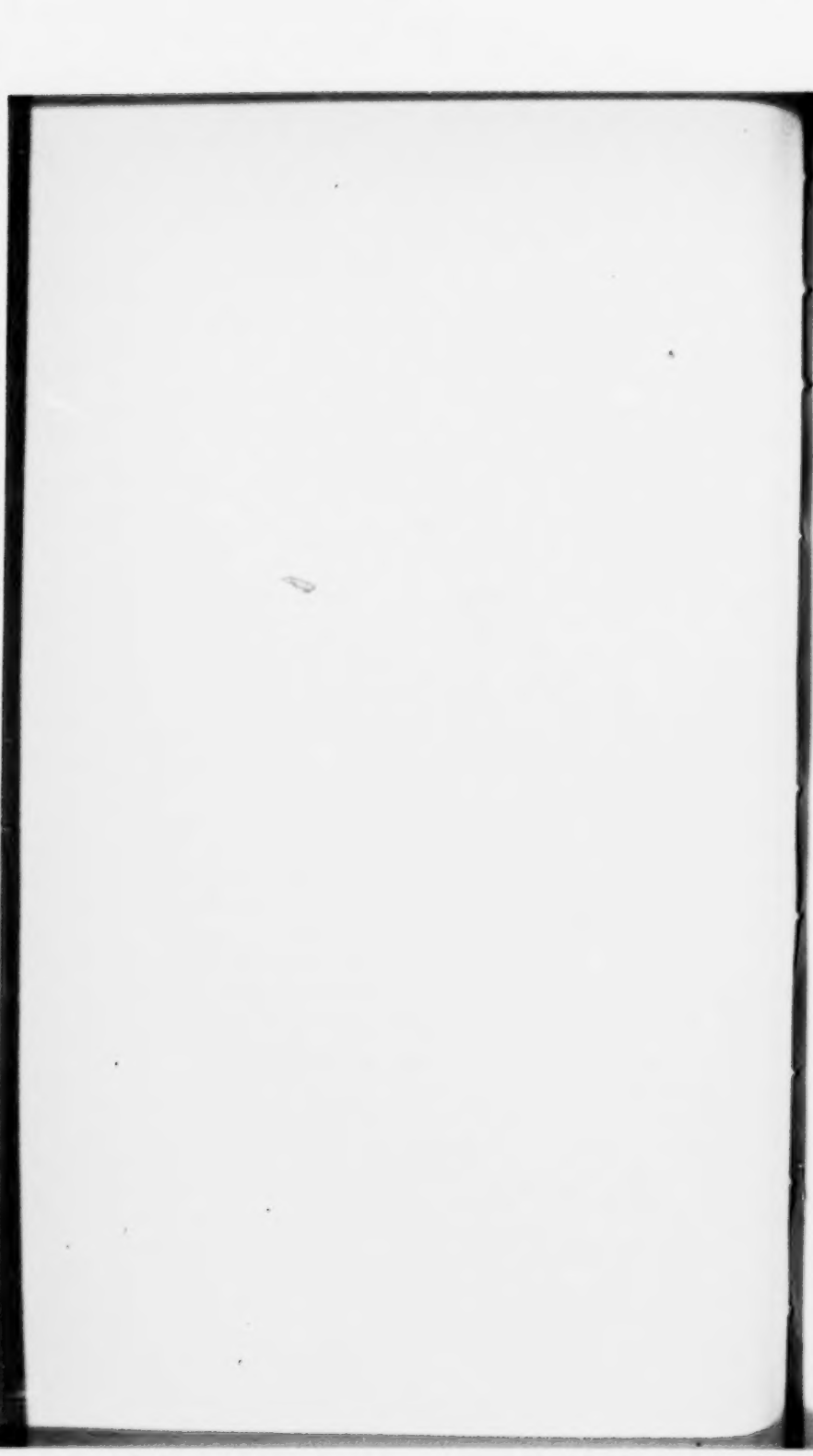
BRIEF OF APPELLEES ON APPEAL FROM DECREE OF  
THE UNITED STATES CIRCUIT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK SUS-  
TAINING DEMURRERS TO THE BILL  
OF COMPLAINT.

---

EDWARD R. O'MALLEY,  
*Attorney-General of the State of New York,*  
Capitol, Albany, N. Y.

CHARLES C. LESTER,  
*Of Counsel for Appellees McNulty and Others*  
Saratoga Springs, N. Y.

NASH ROCKWOOD,  
*Of Counsel for Appellees Hathorn and Others*  
Saratoga Springs, N. Y.



## BRIEF OF APPELLEES

---

### UNITED STATES SUPREME COURT

---

STUART LINDSLEY,	Appellant,
<i>against</i>	
NATURAL CARBONIC GAS COMPANY, WILLIAM S. JACKSON, as Attorney-Gen- eral of the State of New York, and Others,	Appellees.

This is an appeal from a decree of the United States Circuit Court for the Southern District of New York sustaining demurrers to the bill of complaint and dismissing said bill, in a suit in which the complainant sought to restrain the defendants from taking any steps to enforce Chapter 429 of the Laws of 1908 of the State of New York, entitled "An act for the preservation of the natural mineral springs of the State and to prevent waste and impairment of its natural mineral waters."

The bill of complaint of the complainant, who sued in his own behalf and in behalf of all other bondholders and stockholders similarly situated, contains allegations:

I. That the complainant is a citizen of New Jersey and holds certain bonds and stock of the Natural Carbonic Gas Company.

II. That the defendant Natural Carbonic Gas Company is incorporated under the laws of the State of New York, has an extensive business and property con-



sisting of lands and machinery and a capital stock of \$1,000,000, "and became the successor to the Natural Carbonic Gas Company of New Jersey, a foreign corporation, \* \* \* and duly acquired and succeeded to all the property and rights and good will of said New Jersey corporation, subject to mortgage given to secure an issue of \$400,000 par value of bonds already issued and outstanding (including those aforesaid owned and held by your orator), which bonds, so secured, the said gas company, the defendant herein, assumed and agreed to pay," and on which it has paid interest; that the defendant gas company also assumed and agreed to pay debenture bonds, "including those aforesaid owned and held by your orator," and has paid interest thereon; that the mortgage covers the defendant gas company's lands and property.

III. That the defendant's lands contain carbonic acid gas and mineral waters holding in solution natural mineral salts and an excess of such gas.

IV. That such waters are percolating waters and do not naturally flow upon the surface.

V. That in order to reach the waters the company has bored wells into the rock and lifts by pumps to the surface only such waters and gas as flow by reason of the laws of nature into its wells; that many other persons and corporations own lands containing mineral waters; that when defendant began pumping none of the natural springs of Saratoga flowed at the surface of the ground; that when said mineral water is raised to the surface the excess of carbonic acid gas escaping is caught by defendant and compressed and sold; that no process is used to separate the gas and only so much is used as escapes naturally from the water and none is wasted.

VI. That, prior to the enactment of Chapter 429 of

the Laws of 1908, defendant had a plant for bottling waters for drinking purposes.

VII. That many other companies were engaged in the same business therein and have made investments aggregating upwards of a million dollars.

VIII. That the Legislature of the State of New York passed the act known as Chapter 429 of the Laws of 1908, which is set out at length in the complaint.

IX. That before the enactment of such law defendant was pumping from wells bored into the rock and has ever since continued to do so and has had money invested in the business.

X. That heretofore the defendants James D. McNulty and others organized an association to procure the passage of said law and did procure the passage thereof and have since announced their intention to enforce the same.

XI. That the defendant Hathorn owns a spring producing waters of said description and also threatens to enforce said law.

XII. That prior to the passage of said law said defendants combined and schemed to prevent said Natural Carbonic Gas Company and others from pumping and requested said company to desist from pumping and aided and assisted in passing said act.

XIII. That said act violates the 5th and 14th amendments to the Constitution of the United States and is otherwise unconstitutional.

XIV. That the Attorney-General of the State of New York intends to institute actions against said company.

XV. That if ten qualified citizens request him, the Attorney-General is compelled by law to institute such actions.

XVI. The stocks and bonds of the defendant company are owned among more than 350 persons, resi-

dents of different States, and are held by banks as security for loans.

XVII. That said company, under the Constitution of the United States, is entitled to operate its wells and make profit therefrom.

XVIII. That to enforce said act would subject said company to a multitude of suits and prevent it from making profits and compel it to abandon its business.

XIX. That it is necessary for said company to continue its business and, if restrained, it will be unable to pay interest on said bonds or dividend on said stock, and complainant and other stockholders and bondholders will be without remedy.

XX. That the business which would be impaired is of great value, as well as the property of said company, and complainant therefore demands, (1) That the act in question be decreed to be unconstitutional; (2) That it be decreed that complainants have no adequate remedy at law and are threatened with irreparable injury; (3) That writs be issued restraining the company from obeying the law and the other defendants from enforcing the same, and that a restraining order be made *pendente lite*; (4) That, if any other persons attempt to enforce said act, such persons be made defendants, and (5) That a subpoena issue, etc.

To this bill of complaint the defendants, James D. McNulty and others, members of the Citizens Committee mentioned in the bill of complaint, and also the defendant Hathorn, demur upon the grounds:

First: That it appears by his bill that the complainant has no legal capacity to maintain the suit for the reasons:

I. It is not shown that the complainant holds stock or bonds of the defendant.

II. No valid contract is shown by which the defendant company assumed or became liable to pay any bonds mentioned in the complaint.

III. It does not appear that the complainant is a creditor of the defendant company.

Second: That it appears by the bill that the complainant is not entitled to the relief prayed for, for the reasons:

I. The threatened injury is to the rights of the defendant company which is competent and able to protect its rights.

II. It does not appear that the defendant company is under any disability to sue or has refused to sue or has been requested to sue.

III. No request is shown by the complainant for action on the part of the corporation.

IV. Nor does it appear that the suit is not a collusive one.

V. Nor that the maker of the bonds is not responsible and able to pay them when due.

VI. Nor that the mortgage therein mentioned is not full and adequate security for the payment of said bonds.

VII. Nor that any reasons exist why the complainant should be permitted to interpose and enforce the rights and remedies of the defendant company.

Third: That the bill does not comply with Equity Rule 94.

I. Because being founded on the rights of the corporation there is no allegation that the suit is not a collusive one.

II. The bill does not set forth with particularity the complainant's efforts to secure action.

Fourth: Chapter 429 of the Laws of 1908 is a constitutional enactment.

Fifth: Said chapter 429 is a criminal statute the enforcement of which equity will not enjoin.

Sixth: It appears upon the face of the bill that the complainant has an adequate remedy at law.

Seventh: That the complainant has not stated a case that entitles him to the relief sought. And the said defendants pray for a dismissal of said bill with costs.

The Attorney-General of the State of New York also interposed a demurrer to the bill of complaint upon substantially the same grounds as the demurrers of the other defendants.

The cause was brought to a hearing upon the demurrers and the demurrers were sustained. From the decree or judgment of the United States Circuit Court sustaining the demurrers the complainants have now appealed to the Supreme Court of the United States and this application is for an injunction *pendente lite* to the same effect as the injunction prayed for in the bill of complaint.

## I.

THE BILL OF COMPLAINT IS FATALLY DEFECTIVE IN FAILING TO SHOW ANY RIGHT IN COMPLAINANT TO MAINTAIN THE SUIT.

*First: The bill does not show any interest on the part of the complainant in the subject matter of the litigation.*

It is stated in the complaint (fol. 7) that the complainant is the owner and holder of five first mortgage gold coupon bonds and other bonds and capital stock of the Natural Carbonic Gas Company.

The complaint is, however, barren of any allegations

that the Natural Carbonic Gas Company ever executed any bonds or negotiated or delivered the same in such manner that they became valid obligations. There is no copy of any bond attached to the bill of complaint, nor are the conditions of said bonds, their date, or the terms of payment anywhere mentioned. Moreover, it does not appear whether the bonds were bonds of the New Jersey corporation (fol. 10) or of the New York corporation which is said to have succeeded the New Jersey corporation. Such allegations are, therefore, entirely insufficient upon which to appeal to the court for the enforcement of a supposed right on the part of the complainant.

It is like the attempt of the holder of a policy of insurance to maintain a claim for payment of a loss thereunder without any allegations of the execution of any contract of insurance by the company. In such a case it has been held that a counterclaim under a policy of insurance, where the insurance contract is not set out and no facts are alleged from which the court may infer that such a contract was entered into, is insufficient. In such a case it was said by Judge Bischoff:

"At best, there is the statement that, 'under the terms' of certain instruments, the plaintiff 'agreed' to insure the defendant for certain purposes; but this is only a conclusion of law which the demurrer does not admit. The fact of the making of an enforceable agreement involves the meeting of the minds of the parties for some consideration; and the averments of the pleading must, directly or by reasonable inference, disclose the presence of a consideration."

Aetna Life Ins. Co. v. North Star Mines Co.,  
56 Misc. 164-166.

Citing *Burnet v. Bisco*, 4 Johns. 235; *Baylies*  
Code Pleadings, 135, § 20.

See *National Citizens' Bank v. Toplitz*, 178  
N. Y. 464.

In the present case the difficulty is accentuated by the fact that the allegations of the complainant fail to show what corporation's bonds and stocks it holds. The inference from the alleged assumption of their payment (fol. 10) would be that they are the bonds of the New Jersey corporation which, for aught that appears, is still existing and able to answer any demands that may be made against it.

*Second: No valid contract appears in the bill of complaint by which the defendant gas company became liable for the payment of the complainant's bonds.*

The allegations in this regard are that the defendant gas company succeeded to all the property and rights and good will of the New Jersey corporation, and also "assumed and agreed to pay the bonds in question." The plain implication of this statement is that the bonds were not its own bonds but the bonds of the New Jersey corporation and the same criticism may be made in respect to this statement that was made in respect to the failure of the complainant to set out the proper execution and delivery of any bonds whatever by any company in the preceding point. There is no allegation here of the due execution of any contract or covenant by which the defendant corporation became liable to pay any bonds whatever.

It is like the allegations in *Ovenshire v. Security Mutual Life Ins. Co.* (54 Misc. 435, 441), in which the plaintiff alleged that the defendant corporation "took

over the assets of another company and assumed all its contracts." This was held to be no sufficient allegation upon which to found a suit in equity. As the court remarked in that case,

"A very material fact in the plaintiff's cause of action in this case is the manner and method by which the defendant took over the business of the old association and assumed the contracts of the old associates. If this was done by a contract between the two companies that fact should be alleged, and the contract should be recited or its substance set out."

In that action the defendant's demurrer to the complaint was sustained.

See, also, *Todd v. Union Casualty and Surety Co.*, 70 App. Div. 52.

*Third: The bill of complaint, so far as the action is founded on the rights of the complainant as a stockholder, fails to comply with Equity Rule 94.*

The bill of complaint falls short of alleging that the complainant is the owner of any of the capital stock of the defendant gas company.

But if such allegation were found in the bill it would still be obnoxious to the objection that it failed to comply with Equity Rule 94, for it is barren of any of the allegations which that rule requires.

Rule 94 of the rules of practice in equity in the courts of the United States requires that the bill should contain allegations that the suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cogniz-



ance, and that it should set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees and the causes of his failure to obtain said action.

The necessity for such allegations has been affirmed and reiterated by a long line of decisions and no case can be found where their necessity has been questioned when the point was raised. The following cases illustrate this proposition:

Whitney v. Fairbanks, 54 Fed. Rep. 985.

Hawes v. Oakland, 104 U. S. 450.

Huntington v. Palmer, *id.* 482.

Greenwood v. Freight Co., 105 U. S. 13-17.

Detroit v. Dean, 106 U. S. 537.

Dimpfell v. Ohio & Mississippi R. Co., 110 U. S. 209.

Quincy v. Steel, 129 U. S. 241.

Corbus v. Gold Mining Co., 187 U. S. 455.

Doctor v. Harrington, 196 U. S. 579.

In *Smyth v. Ames* (169 U. S. 466), bills were maintained by stockholders against railroad corporations and State officials to restrain the latter from enforcing the statutes of the State of Nebraska on the ground that the same would be confiscatory and, therefore, unconstitutional. In this case it does not appear that the bill contained any allegations of an effort on the part of the complainants to obtain action by the corporation to resist the enforcement of the statutes complained of, or that they had refused so to do; but Mr. Justice Harlan, delivering the opinion of the court, stated that it *was not objected at the argument* that there had been any departure from the 94th equity rule, and the question whether there had been such departure was not further discussed in his opinion.

In the case of *Pollock v. Farmers' Loan & Trust Co.*, brought to prevent the payment of a tax claimed to be unconstitutional, the objection of an adequate remedy at law not having been raised in the court below and the question of jurisdiction having been waived, the court proceeded to judgment on the merits. It was held in *Corbus v. Gold Mining Company* (187 U. S. 455), that the *Pollock* case does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation, *and that the complainant in such a case must show that he has taken every essential preliminary step to justify his claim to act in behalf of the corporation.*

The objection that the bill does not contain the allegation in question is not merely formal but goes to the right of the complainant to maintain the suit. Shareholders in a corporation cannot generally sue to redress injuries done to the corporation. Such right of action rests ordinarily in the corporation. It is to be exercised through its board of directors or other appropriate officers; and the same rule is applicable in equity as well as in law. It is only where the directors or officers of the corporation will not act that shareholders can maintain a suit to enforce corporate rights; and it must appear that they have exhausted all the remedial agencies which the charter or other laws of the corporation afford.

10 Cyc. 963.

It is contended that the 94th equity rule was promulgated to prevent the bringing of collusive actions in the Federal courts by nonresident stockholders. Such may have been one of the reasons, but not the sole reason, because the rule simply affirms the English rule and the rule that prevailed in the several States

that a single stockholder might not interpose to enforce the rights of the corporation unless some reason for so doing existed either in the incapacity or nonaction or fraud of the corporate directors.

This rule is recognized by the court in *Hawes v. Oakland* (104 U. S. 450), as a rule in force in the States as well as in England. In England and in the State courts there could be no such reason as that upon which it is now claimed to be founded. It is therefore error to say that the rule was promulgated to prevent the bringing of collusive actions in the Federal courts. The reason for the rule rests upon the relations of a stockholder to his corporation and is stated by Mr. Justice Wells in *Brewer v. Boston Theatre* (104 Mass. 378-386), as follows:

"One question raised by the demurrers is, whether the bills show sufficient cause for maintaining actions in this form in the name of other parties than the corporation whose interests alone are affected directly, whose rights are to be vindicated, and to whose use exclusively the judgment, if recovered, must inure.

"It is unquestioned that, at law, no action could be maintained for the causes set forth, otherwise than in the name and by the authority of the corporation itself. Ordinarily the same rule will apply in equity. It is only from the necessity of the case, and to prevent a failure of justice, that suits in equity in the form of these bills are allowed. To justify a suit in this form, the bill must show that suitable redress is not attainable through the action of the corporation. To this extent, all authorities agree."

The bill of complaint in the present case is absolutely devoid of any statement showing a reason why a court

of equity should intervene in behalf of a single stockholder of the defendant gas company, which is entirely capable of defending itself and resisting the enforcement of an unconstitutional law, and has not refused to do so, and is not incapacitated from so doing, and is not alleged to be acting fraudulently; but, on the contrary, in the language of Judge Ward in his opinion rendered upon the motion for a preliminary injunction in this case, "It is quite evident that the gas company and its directors must be in entire sympathy with the bill."

Mr. Justice Miller, delivering the opinion of the court in *Hawes v. Oakland* (104 U. S. 450), says, at page 457:

"In this country the cases outside of the Federal courts are not numerous, and, while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding *ultra vires*. *Marsh v. Eastern Railroad Co.* (40 N. H. 548); *Peabody v. Flint*, 6 Allen (Mass.), 52. In *Brewer v. Boston Theatre* (104 Mass. 378), the general doctrine and its limitations are very well stated. See also *Hersey v. Veazie*, 24 Me. 9; and *Samuel v. Holladay*, 1 Woolw. 400."

And again at page 460,

"This examination of *Dodge v. Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American

courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

“ We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit: Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

“ Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

“ Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

“ Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

“ Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the Court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

" But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the Court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the Court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

" The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

" It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the Court."

The doctrine of *Hawes v. Oakland* was affirmed in *Huntington v. Palmer* (104 U. S. 482), and no case can be found in which it has been questioned.

This doctrine is recognized by the courts of the State of New York and fortified by a uniform current of authority.

In *Flynn v. Brooklyn Street Railroad Company* (158 N. Y., on page 507), Judge Vann says:

“As a general rule courts have nothing to do with the internal management of business corporations. Whatever may lawfully be done by the directors or stockholders, acting through majorities prescribed by law, must of necessity be submitted to by the minority, for corporations can be conducted upon no other basis. All questions within the scope of the corporate powers which relate to the policy of administration, to the expediency of proposed measures or to the consideration of contracts, provided it is not so grossly inadequate as to be evidence of fraud, are beyond the province of the court.”

And in *Schwab v. Potter Co.* (194 N. Y., p. 414), Judge Vann said:

“The main question presented by this appeal is whether the proposed transaction is beyond the powers of the defendant corporation, for it is well established that, in the absence of fraud or bad faith, courts have nothing to do with the internal management of business corporations, provided they keep within their corporate powers.”

*Fourth: No reason is shown why the complainant as a creditor should be permitted to interpose and enforce the rights of the defendant company.*

The right of the complainant to maintain this suit on the ground that he is a creditor of the defendant corporation as well as a stockholder, if any such right exists, must be subject to the same limitations; and a creditor could only be entitled to relief in equity where the corporation was failing, neglecting or refusing to defend itself against unjust claims or proceedings.

Conceding that the directors of a corporation are trustees for creditors as well as stockholders and that the latter are entitled to equal remedies in a court of equity to compel the officers of the corporation properly to execute their trusts, creditors can certainly have no greater rights than stockholders would have. It would be intolerable if a creditor of a corporation not in default could, at any time, without any allegation of neglect or refusal upon the part of the directors, and without any other reason being alleged for such action than the bare fact that the complainant held an obligation of the corporation, usurp their duties and powers and take upon himself the enforcement of the corporate rights without regard to their views or opinions and without giving them any opportunity to exercise their discretion or perform their duties. No claim of such a right has ever been put forward by a creditor of a corporation, so far as can be discovered from the reported cases, although it has been suggested that creditors have similar rights in such cases to those of stockholders. The reports, however, are meager of authorities upholding a right in a creditor to interpose for the vindication of rights that belong to the corporation and which its officers are competent, ready and willing to protect; and it has been said that such a right would not be recognized except under very extraordinary circumstances.



Bayshaw v. Eastern Union Railway Co., 2  
Mac. & G. 389.

Herrick v. Grand Trunk Railway Co., 7 Up.  
Can. L. J. 240.

Syers v. Brighton Brewery Co., 11 L. T. N.  
S. 560.

Mills v. Northern Railway of Buenos Ayres,  
23 L. T. N. S. 719.

Evans v. Coventry, 5 DeG. M. & G. 911.

The mere fact that the Court has jurisdiction of an action where the provisions of the Federal Constitution are involved does not make it a matter of course to apply the remedies of a court of equity where the complainant shows no foundation for intervention in his behalf. The question is not one of jurisdiction but of the status of the complainant to invoke the equitable jurisdiction of the Court and to be permitted to interpose and vindicate the rights of a corporation able and willing to defend itself.

This doctrine regulating and limiting the rights of stockholders to interfere with the management of corporate affairs by stockholders is equally applicable to interference by creditors. It is applicable to every case where one claims to assert or vindicate the rights of a corporation which is not shown to be unwilling to assert its own rights or incapable of properly vindicating them.

The cases which have been cited as holding a contrary doctrine fail to establish the proposition contended for by the complainant. The question here presented was not considered in either of the following cases:

Reagan v. Farmers' Loan & Trust Co., 154  
U. S. 362.

Smyth v. Ames, 169 U. S. 466.

The attention of the Court is respectfully called to the English rule, which also obtains in the States generally, of which mention is made by Mr. Justice Miller in *Hawes v. Oakland* (*supra*), and which he says is well stated in the language of Justice Wells in *Brewer v. Boston Theatre* (104 Mass. 378, 386), quoted above.

The complainants have wholly failed to bring themselves within this rule.

In closing this branch of the argument attention should be called to the fact that the bill of complaint contains no allegation that the company issuing the bonds is not abundantly responsible nor that the security therefor is not ample.

The complainant, it is true, alleges that the New York corporation has no other property or source of revenue except the business which is carried on upon its property and that, if enjoined from prosecuting its business, it will not be able to pay the interest upon its bonds nor dividends upon its stock. Inasmuch as there is no allegation that the complainants have any stock in the defendant corporation, it is immaterial whether it pays dividends on that stock, and so far as the bonds are concerned there is no valid contract set out in the bill of complaint by which the defendant corporation is liable to pay either principal or interest upon them; but the bill is devoid of any allegations of the insolvency or want of financial responsibility of the New Jersey corporation which made the bonds in question, and the presumption is in the absence of such allegations, that the obligor is able to pay its obligations. Moreover, it would seem that these bonds are secured by a mortgage and there is no allegation that the mortgage is not adequate security for them. The whole complaint rests upon allegations that a domestic corporation none of whose stock the complainant alleges to hold and which is not shown to be liable for the pay-

ment of the bonds, will not be able to pay dividends on its stock nor the interest on the bonds of the New Jersey corporation unless it continues its business which the complainant says is in jeopardy from the defendant's threatened action.

The remedy for which the act provides is an injunction which is a personal remedy and does not result in any charge or incumbrance upon the land upon which the complainant's bonds are said to be secured.

The statement of this proposition is sufficient without further argument. The remedy bears upon the New York corporation and is a remedy *in personam*. It is therefore a matter of indifference to the complainant, so far as any rights are concerned which are set out in the bill, whether the defendant company is enjoined from pumping its springs or not.

## II.

THE ACTION SO FAR AS IT PROCEEDS  
AGAINST THE ATTORNEY-GENERAL IS BE-  
YOND THE POWER OF THE COURT.

The Attorney-General of the State of New York has also interposed a demurrer to this complaint and raises the objection that this Court cannot enjoin him in the performance of his official duties as representative of the sovereign power of his State.

This is forbidden by the eleventh amendment to the Federal Constitution.

Louisiana v. Jumel, 107 U. S. 711.

Ralston v. Mo. F. Comrs., 120 id. 390.

In re Ayres, 123 id. 433-497.

In the latter case it was said that, in order to secure the manifest purpose of the constitutional exemption

guaranteed by the eleventh amendment, it should be interpreted, not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and that it must be held to cover not only suits brought against a State by name but those against its officers, agents and representatives, where the State, though not named, is the real party against which the relief is asked and the judgment will operate.

In this case, Mr. Justice Matthews, in delivering the opinion of the Court, made use of the following language which is so applicable to the present situation that the defendant's counsel, at the risk of undue prolixity, ventures to quote his words:

“The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia, in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains — supposing that such a suit could be maintained — it would have been subjected to the jurisdiction of the Court by process served upon its Governor and Attorney-General, according to the precedents in such cases. *New Jersey v. New York*, 5 Pet. 284, 288, 290; *Kentucky v. Dennison*, 24 How. 66, 96, 97; Rule 5 of 1884, 108 U. S. 574. If a decree could have been rendered enjoining the State from bringing suits against its taxpayers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its Attorney-General, and the Commonwealth's at-

torneys for the several counties. For a breach of such an injunction, these officers would be amenable to the Court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment."

The claim that this is not a suit against the State upon the authority of *Smyth v. Ames* (169 U. S. 466), is not well founded.

In that case the defendants were an administrative board acting in a limited sphere for certain statutory purposes.

The Attorney-General of the State of New York, on the other hand, is a constitutional officer representing the State in its sovereign capacity. If he acts he will act in the name of the People of the State of New York and not on behalf of any board of officers having limited statutory powers, nor on behalf of any individual.

The case differs, therefore, from *Smyth v. Ames*, *supra*, and is clearly within the constitutional provision to which reference has been made.

### III.

THIS COURT WILL ACCEPT AND FOLLOW THE INTERPRETATION OF THE STATUTE AS GIVEN BY THE STATE TRIBUNALS; AND THE JUDGMENT OF THE STATE COURTS CONSTRUING THE MEANING AND SCOPE OF THE ACT IS CONCLUSIVE HERE.

We come to this Court on this appeal with no question of construction or interpretation open for review. In a fierce and protracted legal battle, the various questions which have arisen as to the scope and meaning of chapter 429 of the Laws of 1908, have been

presented to every Court of the State of New York, and on two occasions the Court of Appeals of that State has carefully and deliberately considered and interpreted the statute in its every phrase and word.

Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326.

People v. N. Y. Carbonic Gas Co., 196 N. Y. 421.

In these decisions the Court of last resort of the State has held that the third prohibition or subdivision of the statute is a constitutional and valid legislative enactment, and that it must be construed, not as an arbitrary and absolute prohibition of the acts therein described, regardless of all conditions and circumstances, but simply and only as a restriction of those acts, and as a prohibition thereof, when shown by proof to constitute an unreasonable user by one owner which is in fact, or which may reasonably be expected to become, injurious to the rights of others, as having a tendency to destroy and waste a great natural resource of the State, and to deprive its citizens of the right to a reasonable and beneficial enjoyment thereof.

In its decision in *People v. New York Carbonic Gas Company* (196 N. Y. 415), the Court of Appeals of the State of New York has expressly and in terms, at page 433 of its opinion, declared itself upon this subject of construction thus:

“The act of 1908 contained four prohibitory clauses, more or less, directed to the purpose as declared in the title, namely: ‘the protection of the natural mineral springs of the State and to prevent waste and impairment of its natural mineral waters.’ Of these four clauses, three were con-

demned, because too broad and unqualified, when tested by the common-law rule governing the landowner's property rights. The third clause was upheld. That contained a provision prohibiting pumping, or otherwise drawing by artificial appliance, from any well, bored into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas; or pumping, or by any artificial contrivance whatsoever, in any manner, producing an unnatural flow of carbonic acid gas, issuing from, or contained in, any such well, 'for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water.' This provision was upheld, distinctly, upon the ground that it would be enforceable within the operation of the settled common-law rule, which forbids an unreasonable use of subsurface waters to the injury of another's rights. 'It was entirely proper,' it was said, 'for the legislature to adopt the provision in question defining and regulating the rights of persons desiring to use mineral waters like those of Saratoga Springs, and to prevent such use thereof as would either result in waste of the natural resources of the land to the injury of general and public interests, or in the unreasonable impairment of the rights of others entitled to draw from a common source' (p. 343). As these results flowed from the defendant's use of its wells, under the allegations of the complaint, the statutory prohibition was held to apply and to be available in protection of the plaintiff's rights. It is, or should be, clear from the opinion that the act was construed in the light of the common-law rule and, so far as it did

not contravene that rule, its prohibition was valid, when invoked for the protection of those, who were suffering injury to their legal rights from the unreasonable use made by another of his property, in a region covered by the terms of the act. What we intended to hold, and, as I think, did hold, was, that, while a landowner was entitled to make every use of the waters flowing under the surface of his land, which might be for the legitimate improvement, or enjoyment, of his lands, however it interfered with others as a natural consequence, if his use was unreasonable, in the sense that he was attempting to increase the flow of the waters upon his lands, for a purpose not connected with such improvement, or enjoyment, and to the destruction, or diminution, of the flow under the adjacent lands of others, he was committing an unlawful act. The waste committed by an owner in his use of his property, if complained of, must appear to be such as affected the rights of other landowners to the appropriation of the subsurface waters, existing as a common source of supply and within the area subject to the influence of the mechanical contrivances for their increased flow."

The court then proceeded to assert the proposition that from admissions of the pleadings as presented in that case, aided by the application of well-known physical laws, a presumption of unreasonable user and injury arose, which, in the absence of proof, would bring the defendant within the prohibition of the act; but this presumption it was expressly said, might be overcome if the proof to overcome it could be found. And the court, concluding that the judgment in that case should be reversed because of the refusal of the trial



justice to permit the introduction of evidence of the defendant in rebuttal of this presumption said at page 437:

“But, inasmuch as the proper reading of the third provision of the act forbids a construction that it is unqualifiedly prohibitory of the pumping of the mineral waters, for the purpose of separating and vending the gas as a commodity, without reference to the reasonableness of such a use of the property, relatively to the rights of others, the importance and materiality of evidence, offered by a defendant to show that his wells, with their pumping appliances, caused no unnatural flow and had no affect upon the properties of others, entitled to draw from a common source of supply, become apparent. The right to equitable relief depends upon whether that which is demanded appears to be proper upon an investigation of the facts. That the statute is not applicable to their case, the defendants should have been permitted to show by any competent evidence. They were entitled to show the situation of their wells, the necessity of the pumping appliances used and that no acts of theirs, in that respect affected any other spring, or well, or resulted in injury to any other person.”

We have quoted thus fully from the decision of the New York Court of Appeals in the case cited, that the interpretation of the act as made by that court and its scope and meaning, as thus defined and limited, may be clearly and fully understood; for we believe, and confidently assert, that such an interpretation and such a construction must settle at once and for all time any and all question as to the validity and propriety of the act. Such an interpretation, limiting

the prohibition of the statute to operations, unreasonable and injurious in their tendency and effect, is in precise accord with the common-law rule of relative property rights which has long been declared and enforced in the State to which the statute applies. Such a statute, so construed, infringes no property right, and transcends no constitutional limitation; for no man in the State of New York has a property right or privilege in the premises.

People v. New York Carbonic Gas Co.,  
196 N. Y. 421.

Hathorn v. Natural Carbonic Gas Co., 194  
N. Y. 326.

Forbell v. City of New York, 164 N. Y.  
522.

People v. Squires, 107 N. Y. 593.

Smith v. City of Brooklyn, 18 App. Div.  
340.

Hathorn v. Strong, 55 Misc. Rep. 445.

Being then thus consonant with the principles of the common law, and in full accord with the settled idea of property rights promulgated and enforced in this State, this statute is not open to the criticism that it deprives the appellant of any right or privilege which is guaranteed to him by the fundamental law, and there being no right to be invaded, and no privilege to be infringed, there can be no deprivation or transgression. This last proposition seems to us so elementary as to render the citation of authority in its support a useless and wholly unnecessary formality, if not in fact an improper departure from the rules of this court.

And the interpretation thus accorded to the statute is the interpretation, and the only interpretation, under the settled rules of this court, which can be placed upon the act when it comes here for judicial scrutiny

in the tribunal of last and final resort; for it is well-settled that the courts of the several states have the right to construe their own statutes, that this is a function to be exercised exclusively by them, and that their judgment upon such matters is conclusive upon all federal tribunals.

Palmer v. Texas, 212 U. S. 118-131.

United States v. Munson, 213 U. S. 118-131.

Stutsman Co. v. Wallace, 142 U. S. 293.

Moore v. National Bank, 104 U. S. 625.

Bauserman v. Blut, 147 U. S. 647.

Failfield v. Gallatin, 100 U. S. 47.

Construed then, as it must be, as in no wise an invasion of property rights, the statute in question cannot be said to be violative of the fundamental law in this regard. All matters of interpretation and construction are now eliminated, for they have been conclusively settled by those tribunals to which, under our system, has been entrusted the duty of interpretation.

#### IV.

THE ACT OF THE LEGISLATURE OF THE STATE OF NEW YORK KNOWN AS CHAPTER 429 OF THE LAWS OF 1908 IS CONSTITUTIONAL.

Since this suit was begun the question of the constitutionality of the act of the Legislature of the State of New York set out in the bill of complaint has been passed upon twice by the Court of Appeals and its constitutionality has been upheld so far as the provisions are concerned which are applicable to the defendant gas company. The opinions of the Court in

Hathorn v. Natural Carbonic Gas Company (194 N. Y. 326) and People v. N. Y. Carbonic Acid Gas Co. (196 N. Y. 421) show that these cases were disposed of after a consideration by the Court of the rights of owners of real property in the State of New York and they will be accepted by this Court as a final adjudication upon such rights.

It will be seen by an examination of these opinions that the third provision contained in the first section of the statute has been upheld as a constitutional enactment. This provision is in the following language:

"Pumping, or otherwise drawing by artificial appliance from any well made by boring or drilling into the rock, that class of waters holding in solution mineral salts and an excess of carbonic acid gas or pumping or by any artificial contrivance whatsoever in any manner producing an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful."

The Court of Appeals has held the doctrine of reasonable use to be applicable to the mineral waters described in the statute and has limited the operation of the act to cases of unreasonable use. It has declared a use of the waters disconnected with the land, in such a manner as to impair the equal enjoyment of others having equal rights and dependent upon the same limited source of supply, to be an unreasonable use; and it has upheld the provision quoted above as a valid

regulation of the acts of those desiring to use such waters, entitled to draw from a common source of supply, and seeking to reduce them to possession, so as to prevent unreasonable impairment of their mutual rights, as well as the rights of the public, by securing a just distribution among them and preventing waste.

*First: The doctrine enunciated by the Court of Appeals in the cases arising under the present statute is not a new doctrine, but has been stated in successive decisions and recognized as the law of the State of New York.*

Judge Landon, in stating the rights of the owner of the soil in the subjacent waters, said (*Forbell v. City of New York*, 164 N. Y. 522, 526):

*"It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productions of soil, trade, manufacture, or for whatever else the land as land may serve."*

One of the potent considerations in the discussion of the question of the rights of landowners in subterranean percolating waters has always been the particular use to which they devoted them, and it has never been held that a landowner's rights extended to extracting them from the ground, merchandizing them and sending them away.

Judge Hatch in his opinion in *Smith v. City of Brooklyn* (18 App. Div. 340, 344), says:

*"It seems clear from the reasoning of these cases that the right which exists and which has*

been upheld relates to the beneficial use of the land for some purpose for which the land can be used, connected with its enjoyment as land for the ordinary purposes of agriculture, mining, domestic use or improvement, either public or private."

And again, in his opinion in *Forbell v. City of New York* (47 App. Div. 371, 374), Judge Hatch, in speaking of the case of *Phelps v. Nowlen* (72 N. Y. 40), says:

"There was no attempt there, as here, to draw water from adjoining lands for the purpose of making sale of such water disconnected entirely from the use of the land to which it might be devoted for any purpose or use. And even if it were otherwise, the doctrine of that case certainly cannot be far extended, for in *Barkley v. Wilcox* (86 N. Y. 140), the right to divert the natural course of surface water flowing in no defined channel, by reason of a legitimate improvement of the land, was made to depend upon the exercise of good faith in creating the condition. There can be no sound distinction between the right to divert surface water flowing in no defined channel and the right to divert subterranean water. And as you may not collect the former and discharge it in a volume upon your neighbor's land, so you may not collect all of the latter and devote it either to your own use or the use of another. The objection becomes stronger where, as here, the water thus collected is to be devoted to the use of persons and corporations who have no interest in the land either as proprietor of the part whereon the water is collected, or as owner or proprietor of the land from which the water is drawn."

In the case of *Merrick Water Co. v. City of Brooklyn* (32 App. Div. 454), the court declined to exercise its equitable powers in aid of the plaintiff, who was pumping water out of its ground for transportation and sale and not for any purpose in connection with the land as such or for the purposes of its beneficial enjoyment, and the Court of Appeals affirmed the decision of the Supreme Court without opinion. (See 160 N. Y. 657.)

In the present case the complainant's corporation transcends all limits. It not only uses the mineral waters for no business carried on upon the soil or connected with it, but it even destroys the mineral waters as mineral waters. It extracts therefrom the gas and throws away the enormous volume of water that contained it.

If the statute in question interferes with the complainant's corporation in the prosecution of its business, it cannot for that reason be claimed to interfere with its property rights, for, in carrying on its business it is not exercising any right that belongs to it. It is outside its rights and interfering with the rights of its neighbors.

While his constitutional right to percolating waters is recognized for legitimate and natural purposes connected with the use of his premises, the right of the landowner to market, waste or destroy such waters or to use them for any purpose not connected with the use and enjoyment of his land, stands upon a different basis. Such a right is not absolute, but must be exercised in common with others and, as such is in all respects analogous to the right to pursue and capture wild game, which has always been regarded as completely subject to legislative control.

The rule of correlative rights in percolating waters, when established by the supreme judicial authority of a State, will be recognized by this court.

This doctrine of reasonable use or the correlative rights of landowners in percolating waters is a rule of property which may or may not obtain in all the States of the Union alike, but when it has been declared applicable by the court of last resort in a given State to the rights of owners of real estate therein, such declaration is accepted as final by the Federal courts. To hold that the rule is applicable in a given State is not engrafting upon Federal jurisprudence any new principle. It is simply according to the supreme tribunal in each State the right to settle and declare rights of property within the State. This is the basis on which this court has always proceeded in judging of the constitutionality of acts of State legislatures.

*The foundation of this rule of common ownership of percolating waters is recognized by high authority as applicable to this State.*

Judge Woodward, in his opinion in *Westphal v. City of New York* (75 App. Div. 562; affirmed, 177 N. Y. 140), says at page 256:

“The plaintiffs may convey the rights which they have and this is all that is contemplated by the judgment, and the further suggestion that the award of fee damages to the plaintiff *Westphal* is in reality an award of the depreciation in value of the remainder of their property after the water is taken from it, but includes nothing for the water, is equally without merit. The plaintiff has no property right in the water as such; he does not own the particles of which it is formed, his property in the water is in its use while it remains upon or under his lands; it is the usufructuary right, the same as in flowing water.”



This is a distinct recognition of the doctrine that ownership in the particular drops of water begins only when they are reduced to possession, prior to which they are a common stock, the taking of which and their reduction to possession the Legislature may regulate.

This proposition is abundantly sustained by a wealth of authority in other States.

State v. Ohio Oil Well Co., 150 Ind. 21  
(47 L. R. A. 632).

Westmoreland & Cambria Natural Gas  
Co. v. DeWitt, 130 Pa. St. 235.

Jones v. Forest Oil Co., 44 Atl. Rep. 1074.

Brown v. Vandergrift, 80 Pa. St. 142.

The same principle is applied to the rights of parties in running water in *Kansas v. Colorado* (206 U. S. 46), that each party is entitled to an equitable apportionment of benefits from such waters. This principle is equally applicable to the case at bar, and must necessarily result in favor of the plaintiffs' contention as against the defendant's right to appropriate all percolating waters which he may be able to obtain by the use of most improved machinery for that purpose, to the detriment of these plaintiffs and the public.

The whole train of reasoning of Mr. Justice White in *Ohio Oil Company v. Indiana* (177 U. S. 190) follows naturally in the wake of this proposition which he fortifies by many citations of authorities and their careful and elaborate analysis.

It convicts the argument of the defendant in this case of the same confusion of thought which Justice White, at page 202, described in the following language:

"The confusion of thought which permeates the entire argument is two-fold: First, an entire mis-

conception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate, that is, the right of the owner of the land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached."

And it brings us naturally and irresistibly to the conclusion reached by the learned judge in that case and stated by him at page 210, as follows:

"It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by

them of their privilege to reduce to possession and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the Legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana, which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.

\* \* \*

“Hence, it is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the Legislature of the State we may not interfere.”

So here, when the defendant attempts to show that the Legislature is mistaken in expecting the measure it has taken to protect the mineral waters from accom-

plishing the result it seeks; that pumping wells that penetrate the rock are not destructive to the source of supply; that under this act the gas companies cannot get enough gas to make their business profitable and other considerations of this kind, we may reply in the words of Mr. Justice White that these contentions "really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the Legislature of the State we may not interfere."

In this connection it might be observed that the remark of Justice White just quoted concerning things *feræ naturæ* "which it is unquestioned the Legislature has the authority to forbid all from taking in order to protect them from undue destruction, etc.," is justified by the uniform current of authority.

An act prohibiting the transportation of game which had been killed within the limits of a State was held to be a valid exercise of this power by the Illinois Supreme Court, in *American Express Company v. People* (9 L. R. A. 139), the court saying:

"It is a very common police regulation to be found in every State, to prohibit the hunting and killing of birds and other wild animals in certain seasons of the year, the object of the regulation being the preservation of these animals from complete extermination, by providing for them a period of rest and safety, in which they may procreate and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be questioned."

In the case of *Phelps v. Racey* (60 N. Y. 10), the power of the State to legislate for the preservation of

game was attacked, and in deciding the question, the court said:

“The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for the purposes of food.”

Upon the same grounds the validity of the game laws of Illinois are upheld in *Magner v. People* (97 Ill. 333). It was there said as in the above quoted case of *American Express Co. v. People*, that:

“If the Legislature of the State thought that a statute preventing a citizen from killing quail for sale in the market, and imposing a penalty on a common carrier for shipping or transporting for sale, would result in protecting the game in the State, we perceive no valid reason why a statute of that character might not be enacted.”

In *State v. Ohio Oil Well Co.*, which has been referred to at considerable length under a foregoing point of this brief, the court uses this language, which is applicable to the principle now under consideration:

“The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game, and secure its beneficial use in the future to the citizen.”

The case of *Lawton v. Steele* (152 U. S. 139), is an authority declaring the constitutionality of State laws,

relating to the preservation of game and fish. The court uses this language:

"The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts \* \* \*. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore, it is within the authority of the Legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question."

Citing:

- Commonwealth v. Chapin, 5 Pickering, 199.
- McCready v. Virginia, 94 U. S. 391.
- Vinton v. Welsh, 9 Pick. 87.
- Commonwealth v. Essex Co., 13 Gray (Mass.), 239.
- Smith v. Levinus, 8 N. Y. 472.
- Phelps v. Racey, 60 N. Y. 10.
- Holyoke Co. v. Lyman, 15 Wall. 500.
- Gentile v. State, 29 Ind. 409.

*Second: The Act does not violate Section 1 of the XIVth Amendment to the Federal Constitution in denying to persons the equal protection of the laws.*

A labored but fallacious argument has been presented to establish the proposition that the act is unconstitutional because it denies to persons the equal protection of the laws; and to show that it divides persons and corporations into two classes and permits one of them, that is those whose wells are not bored into the rock, to pump their wells while it forbids to the other class, that is those whose wells are bored into the rock, the privilege of doing the same.

(a)

*The act creates no class of persons deprived of the equal protection of the laws.*

The act does not classify persons. It classifies mineral wells. It forbids all men alike, white and black, high and low, rich and poor, to pump a well that is bored into the rock, and permits all men to pump wells that are not bored into the rock.

The constitution was designed not to protect things, but people. What class of people does this statute permit to pump wells that are bored into the rock? Manifestly none. Where is the favored class? There is none. Those who have them and those who have them not are alike forbidden to pump them. There is no class of people exempted from the prohibition of the statute.

No classification which contravenes constitutional provisions can be predicated upon the possession by some persons or corporations of wells of one description and the possession by others of wells of another description. The corporation that to-day has a well

bored into the rock may to-morrow have a well that does not penetrate it. Nay, more, the same corporation may, and sometimes does in fact, own wells of both sorts, some of which enter the rock while others penetrate only the subjacent soil.

It might as well be argued that, if the Legislature should prohibit the explosion of blasts charged with nitro-glycerine within the limits of any incorporated village, the act would be unconstitutional because it would permit those who had other explosives which might be as dangerous to use them in blasting within the prescribed territory and thus deny to the owners of nitro-glycerine the equal protection of the law.

It would be just as reasonable to say that, if the Legislature should pass a law prohibiting the spearing of pickerel in spawning season in less than eight feet of water, the act would be unconstitutional because it would permit those who had spears of sufficient length to capture fish, while those with short-handled weapons would be able to get none at all.

And in the same way it would be as reasonable to say that a law which forbade a hunter to shoot a duck at a distance of less than one hundred yards, discriminated in favor of the man who had a rifle and against the possessor of a shot-gun.

It cannot, it would seem, have been the intention of the Constitution to condemn acts as denying to citizens the equal protection of the laws where the classification depends upon circumstances so adventitious and casual as the possession of a certain kind of a gun or spear or explosive or a well of certain depth. The constitutional provision was aimed at discrimination against persons who were relegated to a class by reason of race or creed or color, or by some other substantial and inherent matter that marked them as belonging to



a recognized class of persons from which it was either impossible or impracticable for them to escape and separated them from other citizens. A class whose existence depends upon the temporary possession of a certain thing that has no inherent relation to the individual, which may be possessed to-day and parted with to-morrow, is only an imaginary class and an imaginary classification is not within the spirit or intent of the Constitution.

A consideration of the cases cited by the counsel for the appellant illustrates the want of applicability to the present statute of the constitutional provisions to which reference has been made.

In the case of *Barbier v. Connelly*, 113 U. S. 27, the question arose upon a municipal ordinance provided for the inspection of buildings used as public laundries and prohibiting persons engaged in the laundry business from permitting any one suffering from an infectious or contagious disease to lodge, sleep or remain upon the premises. It might have been urged in that case as an objection to the ordinance, with as much force as the objection to the present statute, that it was as dangerous to the public health to permit people suffering from infectious or contagious diseases to lodge, sleep or remain upon premises on which other sorts of business were carried on as upon premises devoted to the laundry business, and that the ordinance divided persons into two classes and permitted those who were engaged in any other kind of business to harbor persons suffering from infectious or contagious diseases, while it forbade those engaged in the laundry business from doing the same thing. The ordinance was held to be constitutional.

In the latter case of *Yick Wo v. Hopkins* (118 U. S. 356), the question was upon a municipal ordinance simi-

lar to that mentioned in the last case. The ordinance allowed without restriction the use for laundry purposes of buildings of brick or stone but as to wooden buildings it provided that the owners should not carry on a laundry business in them without having first obtained the consent of the board of supervisors. The board of supervisors, acting under the provisions of this ordinance, withheld permission from Chinese subjects and granted permission only to those who were not Chinese subjects. The objection urged against this ordinance was not that it granted to a class of persons who happened to be the owners of brick or stone buildings the right to use them for laundry purposes while it withheld that right from the class of persons who owned wooden buildings. No such objection was urged to the law. The objection was that it divided the owners of wooden buildings into two classes and it enabled the board of supervisors to prohibit Chinese subjects who owned wooden buildings from using them for laundry purposes while they permitted those who were not Chinese subjects to prosecute the same business in the same sort of buildings. To make this case applicable to the present situation, we can suppose that the persons and corporations owning gas wells not bored into the rock should only be permitted to pump their wells with the permission of the president of the village of Saratoga Springs. This would then give to the president of the village the power to create two classes of citizens, to whom an equal protection would not be afforded. He might say that all white men could pump wells of this description, but refuse to grant permission to black men to do the same. He might say that all men having red hair could pump such wells, but those who had black hair should not be accorded the same privilege. Herein might lie the vice of the possible

subdivisions of citizens into classes unequally protected by the laws. But the act is open to no such objection. All are alike forbidden to pump such wells.

This statute affects alike all persons similarly situated; it does not unlawfully discriminate against any. The rule upon the subject is well stated in the case of *State v. Hogan* (63 Ohio State 202; 52 L. R. A. 863), as follows:

“The test of uniform operation and with respect to the required conformity to the law of the land and to the requirement of ‘due process of law’ seems to be that if the law under consideration operates equally upon all who come within the class to be affected, embracing all persons who are, or may be, in like situation and circumstances, and the discrimination of that class is reasonable, not unjust or arbitrary or capricious, but based upon a real distinction, the law does not operate uniformly, and if, in addition to this, the law is enforced by usual and appropriate methods, the requirement of due process of law is satisfied.

\* \* \* \* \*

“It is not essential that it operate upon all the inhabitants of the State, nor is it an objection that it distinguishes a class; in the very nature of things, the law must, in dealing with persons and property and governmental divisions, group persons or objects having similar attributes into classes, and the general assembly must legislate appropriately for each; and unless it may be manifest that such legislation is directly forbidden by the constitution, or the attempted classification is purely arbitrary, unreasonable, unjust or capricious, the power of the general assembly to thus classify cannot be successfully challenged.”

Again, in the case of *Dent v. West Virginia*, 129 U. S. 114, Mr. Justice Field said:

“Legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes adapted to the nature of the case.”

In the case of *Jones v. Brim*, 165 U. S. 184, this language was used:

“The statute being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to defendant the equal protection of the law.”

Other cases peculiarly in point are:

*Minn v. Beckwith*, 129 U. S. 29.

*Soon Hing v. Crowley*, 113 U. S. 705.

*Louisiana v. Schlemmer*, 42 La. Ann. 1166  
(10 L. R. A. 135).

*City of Des Moines v. Keller*, 116 Ia. 648  
(57 L. R. A. 243).

*Sutton v. State*, 96 Tenn. 696 (33 L. R. A. 589).

A broad discretion is and must be vested in the Legislature of every State to prescribe those rules and regulations which enure to the benefit of the citizens thereof, and which are necessary for the protection of their interests. It must be presumed, until the contrary clearly appears, that the law-making body of each State is familiar with the needs of its citizens,

and with the facts and circumstances which render legislation advisable. It is presumed to know the necessary limits and extent of the legislation which it proposes to enact, and it has the right to limit the effect of that legislation to any portion of the citizens of the State, even though only one class is affected thereby; provided that the classification is reasonable, not arbitrary, and is suggested by considerations of public policy. The Legislature must have the right, within reasonable limits, to determine the facts of each case presented to it and the nature of the remedy required, and the provisions of the Fourteenth Amendment of the Constitution of the United States cannot limit this right, so long as the classification determined by the Legislature is reasonable. With the reasonable exercise of this discretion courts cannot and will not interfere.

A statute is not obnoxious to the constitutional provision in question because its effect may be confined to a particular class of citizens, if the law be general in its application to the class to which it applies and if the distinction be not arbitrary, but rest upon some reason of public policy growing out of the condition of business of such class.

*People v. Havnor*, 149 N. Y. 195.

*Mo. v. Lewis*, 101 U. S. 22-30.

*Powell v. Pa.*, 127 U. S. 678.

That portion of the Fourteenth Amendment of the Constitution of the United States commonly known as the "equal rights clause," does not contemplate territorial equality, but only requires that all persons similarly situated shall be alike affected by the law.

*People v. Havnor*, 149 N. Y. 195.

*People ex rel., Armstrong v. Warden*, 183 N. Y. 223.

In both of these cases statutes were upheld which applied to particular classes only, upon the ground that all persons similarly situated were alike affected by the law. It is needless to argue that in the case at bar all persons similarly situated are alike affected; for all persons engaged in the performance of the various acts prohibited by the statute are alike required to cease those acts, and no one person or class of persons is excepted by the provisions thereof. It is to be presumed that the Legislature had a proper reason for specifying the particular acts which it did, and no statute can be declared unconstitutional until it clearly appears that the classification is unreasonable, unnecessary and arbitrary.

(b)

*But if the statute creates classes its classification is reasonable and neither unnecessary nor arbitrary.*

#### EFFECT OF DRILLING INTO THE ROCK.

The defendant's whole argument is based upon the palpable fallacy that pumping a well not bored into the rock is as likely to deplete the wells and springs of others as pumping a well that is bored into the rock. The fallacy of this assumption is too obvious to need comment. It is the unanimous opinion of the scientific men who have made a study of the springs at Saratoga that the waters are brought to the surface from great depths by the presence of carbonic acid gas. The hard and impervious layers of rock confine the gas and cause it to exert the pressure which is instrumental in causing it to be dissolved by the waters, and thus become effective in bringing these waters to the surface; but, when this gas once escapes from the rocks into the subjacent soil, it must, of course, cease in great measure, if not wholly, to be instrumental in effecting such result. Soil, sand

and gravel are notably more porous than rock, and gas once out of the rock can permeate the soil in every direction. It is like steam that has escaped from the boiler; it is no longer efficient to maintain the pressure; its usefulness for that purpose has ceased. So the process of pumping gas, which has escaped from the rock into the soil, is obviously less harmful to other springs and wells, and the foundation for all argument on the score of illegal classification fails.

The bill of complaint does not negative this very obvious ground on which wells that only penetrate the sand and gravel may be presumed less dangerous to the mineral water supply of adjoining owners than wells that penetrate, perhaps to great depths, the rigid and impervious strata from which the mineral waters flow.

This is a sufficient ground upon which to dispose of the present question, since, in the language of the Supreme Court of Appeals of West Virginia in *Peel Splint Co. v. West Va.* (36 W. Va. 302):

“If any conceivable circumstances would justify the exercise of such police power, the Legislature and not the courts is to judge of the prevalence of such circumstances.”

#### DEEP WELLS AND SHALLOW ONES.

But there is another aspect of the classification effected by the statute in question, which completely justifies it as reasonable in character.

To distinguish between wells which penetrate the rock and wells that do not penetrate it is a convenient method of distinguishing between deep wells and shallow ones. This distinction, if reasonable, does not lose its reasonable character from the fact that there may be wells on either side of the line of distinction, in

which the difference in depth may be so slight as to be negligible. Consequences of this kind always and necessarily occur when such lines are drawn by statute. Regulations applied to towns and cities on the ground of density of population are not invalid because some districts outside urban limits are more thickly settled than some districts within, nor regulations prescribing periods of study before practicing certain professions because some individuals who have never pursued the prescribed course may be, in fact, better qualified for such practice than some who have.

Now it requires neither scientific skill nor expert testimony to establish the fact that a deep well, which enables one to exhaust the water at a given point to a great depth, is more of a menace to the water supply of contiguous lands than a shallow one. A ten-foot well, pumped dry, is trivial in the extent of its influence in comparison with a well one hundred feet in depth. The latter would obviously exhaust the water from a much greater area and produce a more far-reaching effect.

This proposition is as obvious as the greater danger from fire in closely built districts where buildings are erected to great heights than where they are restricted to lower altitudes; and the reasonableness of classification upon the latter basis was recognized in this court in the case of *Welch v. Swasey* (214 U. S. 91).

The bill of complaint does not negative the obviously more far-reaching influence that may be exerted by pumping deep wells and that fact is to be presumed in support of the act, if necessary, upon the well known principle that any state of circumstances which will justify a statute upon constitutional grounds must be presumed to exist for the purpose of sustaining the act in the absence of proof to the contrary.



The case at bar comes easily within those authorities which uphold legislative classifications that rest upon rational foundations.

Among these cases are the following illustrating classifications that have been upheld:

- Hayes v. Missouri, 120 U. S. 68.
- Railroad Co. v. Mackey, 127 U. S. 205.
- Walston v. Nevin, 128 U. S. 578.
- Bell's Gap R. R. v. Pa., 134 U. S. 232.
- Pacific Express Co. v. Subert, 142 U. S. 339.
- Giozza v. Tiernan, 148 U. S. 657.
- Columbia Southern Ry. v. Wright, 151 U. S. 470.
- Manhant v. Pa. R. R., 153 U. S. 380.
- St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 1.
- Bacon v. Walker, 204 U. S. 316.

It is, no doubt, true that the act might have gone further than it did and might have prohibited the pumping of mineral waters for the purpose of extracting and vending the gas as a commodity from wells which did not enter the rock, but the failure to include such wells does not render the act unconstitutional.

A law is not unconstitutional as in violation of equal rights because the Legislature did not include all that might have been included, or condemn all acts that might have been condemned. The Legislature has the right of judging what it deems harmful or what it deems should be safeguarded and need not include all harmful acts or guard against everything that apparently needs guarding.

Musco v. United Surety Co., 132 App. Div. 300.

There is no unlawful discrimination, and the act does not deny to any citizen the equal protection of the law.

(c)

*The foregoing argument relating to the claim of illegal classification based upon an alleged discrimination against wells drilled into the rock is applicable to and decisive of a like claim based on the discrimination against a certain use of the waters.*

It has been lately suggested and may be urged upon the argument that the act under consideration may be invalid in that it unreasonably discriminates against the prohibited use and therefore against those engaged in making such use of the waters.

That a classification of persons can thus be effected and that a class can be said to be deprived of the equal protection of the laws on the basis of the use certain individuals seek to make of a particular kind of mineral waters, seems far from any reasonable interpretation of the constitutional provision.

But, if this could be held to be a classification at all, it is obviously a reasonable one, because the use forbidden is such a wasteful use, involving as it does the utilization of so insignificant a part of the waters — the bubbles of gas contained in them — and yet it destroys the value of the residue and renders it fit for nothing but to be thrown away. Moreover, the proscribed use is a use not in any way connected with the land and for which, under the laws governing the rights of owners of lands in the State of New York, they have no vested right to force the flow by pumps or other artificial appliances to the injury of others entitled to draw from the common source of supply. (*Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326-343.)

And finally the bill of complaint is bare of any allegations negating the facts that uphold the prohibition of this particular use on the grounds mentioned; which facts must, therefore, be presumed to exist and to sustain the reasonableness of discriminating against a use so wasteful and one outside the property rights of the complainant's corporation.

*Third: The act is a valid exercise of the police power vested in the Legislature of the State of New York. Its purpose and effect are to prevent the waste and destruction of the natural resources of the State.*

The Legislature of a sovereign State differs from the Federal Congress in that it is not obliged to search for constitutional authority upon which to build its legislative fabric. All grounds of public expediency and all considerations for the public welfare as well as for the personal and individual welfare of its citizens are open to it. It may build where it likes except upon the ground from which the State and Federal Constitutions by their terms exclude it.

If, as has been argued, the act does not invade any right that belongs to an owner of the soil in subjacent percolating waters, under the Laws of the State of New York as declared by its Court of Appeals, it is not necessary to invoke the exercise of the police power.

But if it should be thought that the act in any manner interferes with the property rights of land owners it is justified as a proper exercise of the police power.

The police power of a State is a governmental function incapable of exact definition, but the existence of

which is essential to every well ordered government. Various attempts to define this power in exact terms have failed and writers on jurisprudence have been unable to clearly set forth its limits and boundaries. But it is uniformly held that by virtue of this police power vested in the State, laws may be enacted and enforced for the protection of the health, morals and safety of the people of the State, the protection of common property and the promotion of the general welfare of the commonwealth.

In *Cooley on Constitutional Limitations*, 572, cited and quoted in *People v. Squires* (107 N. Y. 650), the police power of a State is defined in this language:

“The police power of a State in a comprehensive sense embraces its system of internal regulation by which it is sought not only to preserve the public order, and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of the rights of others.”

Judge Shaw in *Commonwealth vs. Alger* (7 Cush-  
ing [Mass.] 85), gives this definition:

“The power we allude to is rather the police power, the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the com-

monwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundary, or to prescribe limitations to its exercise."

In another portion of the same opinion, in speaking of the control over property rights vested in the State by virtue of this police power, the judge uses this language:

"Rights of property, like all other essential and conventional rights are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

In *Meffert v. Packer* (66 Kansas, 710; L. R. A. [N. S.] 811), the police power was defined to be the authority of the State:

"To pass and enforce such laws as in its judgment will enure to the health, morals or general welfare of its people."

This case was affirmed without discussion by the Federal Supreme Court in 195 U. S. 625.

In *People v. King* (110 N. Y. 418), the court in speaking upon this subject said:

"This legislation is under, what for a better name is called the police power of the State, a power incapable of exact definition, but the existence of which is essential to every well ordered government. By means of this power the Legis-

lature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to it and to the community at large. It may be exercised whenever necessary, to secure the peace, good order, health, morals and general welfare of the community, and the propriety of its exercise within constitutional limits, is purely a matter of legislative discretion with which the Courts cannot interfere."

In *Barbier v. Connolly* (113 U. S. 31), Mr. Justice Field defined the police power as:

"That power of the State sometimes termed its police power, whereby it prescribes regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

In *C. B. & Q. Railway v. Drainage Commissioners* (200 U. S. 592), the right of the State to enact legislation in regard to drainage was attacked, and the matter disposed of in this language:

"The learned counsel for the railway company seemed to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety, are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest

that the drainage in question has anything to do with the health of the Drainage District, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the District and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. *We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."*

In *Thorpe v. Rutland R. R.* (27 Vt. 140), it was said:

"According to the maxim '*sic utere tuo ut alienum non laedas*,' it being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may use his property as not to injure others."

The foregoing are some of the attempted definitions of this great function of the Legislature. In each of these the police power has been successfully invoked to sustain legislation relating to a most varied range of subjects. But an enumeration of them is not necessary at this time. We are more particularly concerned with the question as to whether or not the act in question comes within the broad range of this power.

Let us apply these principles to the facts of the present case.

A standard authority (*An Analysis of the Mineral Waters of Saratoga and Ballston* by Dr. John H. Steel) states the aggregate flow of all the natural springs of Saratoga to be about thirty-five gallons per minute.

The complainant's corporation, one of four corporations engaged in the same business, pumps mineral water from its wells at Saratoga at a rate of not less than four or five times as great as the combined flow of all the natural springs of Saratoga.

Can argument be needed to show that such a process is a menace to the mineral water supply of Saratoga?

Natural resources like the Saratoga mineral waters are not inexhaustible; and the United States are to-day confronted with the threatened exhaustion of many that seemed but a few years ago practically inexhaustible, but now exhibit appalling evidences of depletion.

Forests, coal deposits, natural gas and oil are fast disappearing. It is a matter of common knowledge that many regions producing not long ago vast quantities of oil and natural gas are now practically exhausted. Is there any reason to believe that a very circumscribed locality like the Saratoga mineral water basin can be tapped by wells and pumped to a degree far beyond the natural yield with impunity, or without depleting, if not exhausting, its supply of mineral waters.

Can the Court say that the expectation of such depletion is unreasonable? On the contrary, is it not unreasonable to expect that such a process will not produce such a result?

The Court of Appeals has well stated in its opinion in *Hathorn v. The Natural Carbonic Gas Company* (194 N. Y. 326-343),

"But, of course, the right of the Legislature to adopt such a provision as is now being questioned was not limited to a case of present demonstrated injuries from the acts prohibited. It had the power of discretionary and anticipatory legislation



extending over a broad field and the right within its limits to regulate such conduct of its citizens as, being inherently of a more or less indeterminate character, might still result in injury to the public."

And who is to determine what degree of pumping is dangerous to the mineral water supply; and who shall fix the limit of the draughts to be made upon these waters. A like question is propounded and ably answered by Mr. Justice Harlan in the case of *Mugler v. Kansas* (123 U. S. 623-660). We cannot do better than to quote his language here:

"But by whom, or by what authority, is it to be determined whether the manufacturer of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

And who shall determine what is necessary to avert the threatened danger? That power, too, is lodged in the Legislature and its determination is conclusive upon the Courts.

It is not circumscribed by narrow limits, but is very great and may be extended even to the suppression of a lawful business. It is for the Legislature to decide what is necessary in a given case; and its decision, embodied in a statute, can only be disregarded or set aside when the Court can say that the statute enacted has no real or substantial relation to the object sought, but is a clear and unmistakable infringement of rights secured by the fundamental law.

Booth v. Ill., 184 U. S. 425-429.

Welch v. Swasey, 214 Idem. 91-105.

Again using the language of Mr. Justice Harlan, in his opinion in *Powell v. Pa.* (127 U. S. 678), in discussing the power of the Legislature to restrict or prohibit the manufacture and sale of oleomargarine, in which he clearly exhibits the latitude given to the Legislature in such matters as these:

“Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative de-

termination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property; and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself'; yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.' The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk to take the place of but-

ter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

In the case of *Booth v. Illinois* (184 U. S. 425-429), the same able jurist, in discussing the same question, says:

"The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the Legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuits of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts

cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

With questions of expediency, wisdom, fairness and other like questions the courts have nothing to do, unless the act exceeds all bounds of reason; the judgment of the Legislature is final.

Hunter v. City of Pittsburgh, 207 U. S.  
161-176.

And we may still further limit the discussion, and still more narrowly confine the issue to be reviewed by this Court. It has been strenuously argued, and may perforce be as strenuously reiterated, that the statute in question was unwise in its conception, and may become unjust or unfair in its execution. If such or kindred arguments be presented by the appellant, in brief or argument, then will it be answered that the policy, wisdom, justice and fairness of a State statute, and its conformity to the State Constitution, are wholly for the Legislature and the courts of the State to determine, and that with such matters this Court has nothing whatever to do.

Hunter v. City of Pittsburgh, 207 U. S.  
161-176.

This latter idea has been so clearly and definitely expressed as to leave no room for doubt as to the correctness of the proposition. It may, however, add sequence to the argument to quote briefly from the case

cited. In *Hunter v. City of Pittsburgh*, *supra*, this Court said at page 176 of its opinion:

"Some part of the assignments of error and of the arguments in support of them may be quickly disposed of by the application of well-settled principles. We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the courts of the State, and their decision of them is final. The Fifth Amendment to the Constitution of the United States is not restrictive of state, but only of national, action."

To the same effect also see:

*Forsythe v. Hammond*, 166 U. S. 506-518.

*Williams v. Eggleston*, 170 id. 304.

*Kelly v. Pittsburgh*, 104 id. 78-81.

*Wilson v. North Carolina*, 169 id. 586-593.

*Clayborne County v. Brooks*, 111 id. 400-410.

*Mount Pleasant v. Beckwith*, 100 id. 514.

*Laraine County v. Albany Co.*, 92 id. 307.

*Covington v. Kentucky*, 173 id. 731.

With all question as to the policy, wisdom, fairness and justice of the statute thus eliminated, and with it appearing conclusively that, under the act as finally

interpreted, there can be no invasion or deprivation of property, we have no further real question before this Court.

In this connection it is to be noted that the provision in question does not extend to the point of forbidding every use of the mineral waters in the defendant's lands that is not connected with the use of the land as land. It does not forbid the bottling and sale of the waters for drinking or for bathing or for any other uses to which they are adapted. It prohibits only a use which involves the extraction of the gas, a substance that constitutes an extremely small fraction of them, but whose extraction renders the enormous residuum worthless as a remedial agent or for any other purpose and renders it fit only to be cast out and trodden under foot.

It affects only a reasonable restriction upon the right to reduce the waters to possession and ownership.

In respect to some other things of which there is a common stock, there are well-recognized restrictions of different kinds, with which all are familiar and whose validity is never questioned.

Some of these restrictions are limited as to time, such as permitting the taking of different animals during certain limited periods of time and making it unlawful to take them at other times.

Some of them are based upon restrictions as to quantity, permitting a person to take but one or two deer each season or a limited number of game birds.

Some have regard to the use, forbidding the taking of trout or game birds for sale.

The restriction upon the pumping of mineral water belongs to the latter class. It does not go as far as some of the provisions of the game laws. It does not altogether prohibit pumping the waters for sale, but

extends only to the wasteful process of extracting and selling the bubbles of gas and throwing the great bulk of the product away. This process is evidently most wasteful and reminds one of the feast made by the African prince, who, to show his great wealth, fed his guests upon the brains of ostriches, birds famous for their rarity and great value and the insignificant size of their brains.

It may, therefore, as in the case of *Mugler v. Kansas* (123 U. S. 623) and in the case of *Powell v. Pa.* (127 U. S. 678), prohibit the manufacture and sale of useful products or products not in themselves harmful. It may, as in the case of *Booth v. Illinois* (184 U. S. 425), prohibit the further prosecution of a business which is not, in itself, necessarily harmful. It may, as in *Ohio Oil Co. v. Indiana*, prevent the landowner from extracting from his soil the oil and gas which lie below its surface. It may impose substantial burdens upon the ownership of property and limit its use.

And, in the exercise of this power, there is no taking of property in the sense in which the Constitution requires compensation to be made therefor.

*Chicago, B. & R. I. v. Chicago*, 166 U. S. 226-255.

*C., B. & Q. R. R. v. Drainage Commissioners*, 200 id. 561-583.

*West Chicago R. R. v. Chicago*, 201 id. 506-526.

Nor is property taken without due process of law.

*Mugler v. Kansas*, 123 U. S. 623.

*Kidd v. Pearson*, 128 id. 1-15.



*Fourth: The public have such an interest in the mineral waters of Saratoga as justifies the interposition of the Legislature for their protection.*

The purpose of this act under consideration, as set forth in its title, is the "protection of the natural springs of the State and to prevent waste and impairment of its natural mineral waters." The foregoing authorities preclude any possible argument against the right of the State under this police power, to protect and develop its natural resources. That the mineral springs in and about Saratoga Springs are natural resources is a self-evident fact. The waters flowing from those springs are possessed of great curative and health-giving properties, recommended by physicians for use in all parts of the world. The protection of such a resource is a matter which directly involves the public welfare. It is a matter of great public concern though the waters themselves may be the property of private persons.

It has been argued that because the springs are the property of private owners the public are in no wise benefited by their preservation or restoration.

Does not the government annually expend thousands upon thousands of dollars to protect the agriculture of the country from blight and devastation and for the instruction of the tillers of the soil in better methods? Yet the crops when they grow belong to private owners who may, to use the language of the defendant's counsel, make the price of their products prohibitive or refuse to part with them at all. Is it true that the people by the improvements in agriculture are helped not the slightest?

The preservation of the forests would be no less a matter of public concern if they all grew upon lands

belonging to private individuals. The preservation of the forests is not a matter of public consequence because the State owns forest lands. On the contrary the State acquired the forest lands it owns because the preservation of the forests was a matter of such great public consequence.

Judge White, in his opinion in *Ohio Oil Co. v. Indiana* (177 U. S. 190), to which reference has already been made, quoting with approval the language of the court in another case, remarked of oil and gas which were not the property of the public, but of the land owners in whose lands they were found:

“Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject.”

It must be manifest to all that the injury done to the community by the destruction of the mineral fountains of Saratoga is not limited to the injury done to the owners of the mineral fountains themselves. The very existence of Saratoga, a village of 13,000 inhabitants, is founded upon the integrity of these mineral springs. The Grand Union Hotel establishment probably cost for its construction and equipment, \$2,000,000; the United States Hotel represents an original investment of over \$1,000,000; the Congress Hall, Windsor, Kensington and a long list of smaller hotels and boarding houses, representing a great investment of capital, furnishing occupation for thousands of people, are dependent for their value on the integrity of the mineral springs.

Moreover, it is a matter of common knowledge that the mineral waters of Saratoga are remedies of great

therapeutic value in the treatment of many diseases which human flesh is heir to. They have justly been known and recognized as such since the days when the Indians brought Sir William Johnson to the High Rock Spring to be cured of rheumatism. They have been sent to all climes and countries. Commodore Perry when on his way to Japan, a half century ago, was entertained at the home of an English resident in India and a bottle of Congress Water was sent to his room before breakfast. Such remedies produced by nature for the benefit of man are as much entitled to the protection of the State as food products of prime necessity.

Under such circumstances the State may surely intervene to protect these springs by reasonable regulations.

It clearly appears by the very terms of the statute itself, that this act was passed, and is necessary for the preservation of the natural mineral springs of the State of New York, which constitute one of the great natural resources of the State, and whose waters are of great medicinal value to the citizens. If enforced, its effect and its only effect will be to prevent private individuals from wasting and forever destroying this great natural public benefit, and preserving for all time to the people of the State, the right to use this natural resource for their health, comfort and convenience. As was said by Mr. Justice Houghton in his opinion in the Hathorn case:

"Anything affecting the health of a large number of people of the State is within the province of the Legislature to make laws concerning. Concededly the Legislature can pass laws tending to check the spread of contagious diseases or the pollution of water supply. It would seem, also,

within its province and a reasonable exercise of its power, to pass a law tending to preserve for the people at large the natural health-giving mineral waters of the State, and to provide that certain acts which in its judgment might be detrimental to them should be unlawful. There can be little difference in principle between a law designed to prevent a citizen from becoming ill and one designed to aid him in curing the disease from which he suffers. The one is as much a health law as the other."

Judge White, in his opinion in *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 204, 210, to which reference has already been made, quoting with approval the language of the court in another case, remarked of oil and gas which were not the property of the public, but of the landowners in whose lands they were found:

"Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject."

\* \* \* \* \*

"It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted,

can be manifested for the purpose of protecting all the collective owners, by securing a just distribution to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

Justice Holmes in *Hudson Water Co. v. McCarter* (209 U. S. 349-355), expressed the same proposition in the following language:

"But it is recognized that the State as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water and the forests within its territory and irrespective of the assent or dissent of the private owners of the land most immediately concerned."

*Kansas v. Colorado*, 185 U. S. 141-142;  
s. c., 206 id. 46-99.

*Georgia v. Tenn. Copper Co.*, 206 id. 230-238.

But further discussion of this proposition seems unnecessary in view of the decision of this court in *Hathorn v. Natural Carbonic Gas Co.* (194 N. Y. 326-349), in which Judge Hiscock states the conclusion of the court as to the power of the Legislature to pass the act now under consideration, as follows:

"But as an independent proposition, as was pertinently asked by Judge Vann in the *Ballard* case, *supra*, 'While the people have no pecuniary interests \* \* \* have they no interests that need protection?' P. 292. Only one answer, in my judgment, can be made to this question when it

is asked, and that is that they have a substantial interest in the enforcement of the statute furnishing an all-sufficient basis for the maintenance of this action. They have an interest in the preservation of natural products like these mineral waters, and it fairly may be said that they have a substantial and enforceable interest in preserving the just and reasonable use by all the members of a community of a common supply of a natural product and in so curtailing the attempts of one or a few to get an unjust proportion thereof, that the rights of other members of the community will not be interfered with and that disputes and litigation shall not be precipitated and that large amounts of property shall not be endangered.

“These principles do not seem to be novel, but on the other hand to be sustained by ample authority.”

The acts sought to be prohibited by the statute now under consideration are those and those only which waste and destroy the waters and mineral substances, and deprive the springs of their efficacy.

The statute is a regulation of the use, by private citizens, of their property in such manner as to prevent injury to others therefrom and to promote the general welfare by protecting and preserving natural resources of the State; and, moreover, its further aim is to protect the public health.

In his opinion in *Commonwealth v. Alger*, referred to above, Judge Shaw uses this language which is applicable to the matter now under discussion:

“Rights of property like all other essential and conventional rights are subject to such reasonable

limitation in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints, and regulations used by law as the Legislature, under the governing and controlling power vested in them by the constitution may think necessary and expedient."

In the foregoing case the Legislature of Massachusetts passed a law prohibiting the building of wharves in the harbor of Boston beyond certain designated lines. This was held to be clearly a valid enactment.

A law of the State of New York making it a misdemeanor for any person to remove sand, earth or clay from the beach on the south shore of Staten Island from within twenty feet of high water mark was held constitutional and valid as a proper exercise of the police power in protecting the general property of the State.

In all the foregoing cases, the power of the State Legislature to enact laws for the protection of public resources and industries, and for the regulation by private individuals of the use of common property, was sustained by reason of the interest of the public in the matters which the statutes under consideration referred to, and in all of them, the theory of the prevention of waste is a controlling feature. This idea of the prevention of waste is an element in the case at bar, which justifies the legislation. One of the purposes of the act was to prevent waste. Its effect, if enforced, will be to preserve a substance in which all persons in the State have an interest. The statute is therefore a valid exercise of the police power within the foregoing decisions.

As illustrations of some of the purposes for which legislation has been enacted, and sustained, as exercises of the police power, are the following:

(a) Laws forbidding the use of property in a manner hurtful to the health and comfort of the community.

(b) Laws prohibiting the pollution of reservoirs or creeks.

(c) Laws forbidding the erection and use of stables for more than four horses without license from the board of health.

(d) Laws requiring railroad companies to build fences and construct depots.

(e) Destroying property which is a dangerous nuisance.

See American & Eng. Ency. of Law, Vol. 22, page 917.

(f) A law of the State of Maine prohibiting a private owner from denuding the forests on his land.

Among the multitude of cases illustrating the varied range of subjects concerning which State Legislatures may regulate, within this governmental function known as the police power, see the following:

Geer v. Connecticut, 161 U. S. 519.

Lawton v. Steele, 152 id. 133.

Munn v. Illinois, 94 id. 113.

License Cases, 5 How. 504.

Kidd v. Pearson, 128 U. S. 1.

Barbier v. Connolly, 113 id. 27.

Crowley v. Christensen, 137 id. 86.

The People v. Rosenberg, 184 N. Y. 135.

The People v. Squire, 107 id. 593;  
affirmed, 145 U. S. 175.

Smith v. Maryland, 18 How. U. S. 71.



However interesting and instructive it may be to collate the cases exhibiting instances of the exercise of the police power by the Legislature, we need go no further for an authority decisive of the present case than *Ohio Oil Co. v. Indiana* (177 U. S. 190), to which extended reference has already been made. There Justice White in a case in every respect similar to the present declared:

“It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.”

*Fifth: The act of 1908 is a reasonable enactment for the accomplishment of the object sought.*

The act under consideration is violently attacked because it is said it does not appear that the pumping of artesian wells has in fact injured or will necessarily injure any spring and that the restriction cannot be deemed reasonable until it is demonstrated that as a necessary result the destruction of the mineral springs will follow the pumping of wells.

It is no objection to the act that the pumping of a gas well may injure no natural mineral spring nor any other well. To maintain the reasonableness of the restriction it is not necessary to demonstrate that pumping must of necessity in every case destroy some spring. If there is danger of such destruction there is a sufficient foundation for the act and that there is such danger is perfectly obvious.

No one doubts the validity of a municipal ordinance prohibiting the discharge of fire arms in a populous village or city. Yet one might shoot a gun a hundred times in such a place without injuring any one. The danger is a sufficient foundation for the ordinance, even though remote, and though the commission of the act might not and probably would not be followed by injury to any one.

At this point, attention may be again called to the language of Judge Hiscock in *Hathorn v. Natural Carbonic Gas Company*, 194 N. Y. 326-343:

"But, of course, the right of the Legislature to adopt such a provision as is now being questioned was not limited to a case of present demonstrated injuries from the acts prohibited. It had the power of discretionary and anticipatory legislation extending over a broad field, and the right within its limits to regulate such conduct of its citizens as being inherently of a more or less indeterminate character, *might* still result in injury to the public."

Under the circumstances which have been described, resulting in a draught upon the mineral water supply enormously disproportioned to the natural rate of production, is it unreasonable for the State to strive to afford protection to waters so notable as remedial

agents? And is a measure that leaves the owners of springs free to use the waters without limit for drinking or bathing on the premises and even permits their use for like purposes away from the land, the bottling and shipping away of the waters without limit, only prohibiting the business of extracting the gas and merchandising it and thus destroying the waters as remedial agents — is such a measure unreasonable? The answer can only be in the negative.

If such a measure could be held to be unreasonable, then the elaborate precautions taken by foreign governments, notably the governments of European countries, for the protection of their medicinal mineral waters are all unreasonable and it was unreasonable in the original proprietor of the most famous of the mineral springs of Saratoga and of large tracts of contiguous lands, half a century ago, to insert in his conveyances of such lands, when he sold them, stringent provisions against penetrating the soil below the depth requisite for the foundations of buildings. These measures are not unreasonable. They commend themselves to the judgment of every reasonable man as wise and prudent measures.

## V.

THE PRESUMPTION IN FAVOR OF THE VALIDITY OF THE ACT IS NOT OVERTHROWN BY ANY OF THE ALLEGATIONS OF THE BILL OF COMPLAINT.

The act under consideration has been twice considered at length by the Court of Appeals of New York.

Three of the four provisions of the first section of the act have been held unconstitutional by that court, but the third clause or provision has been held to be

a constitutional enactment. That provision is as follows:

“Pumping, or otherwise drawing by artificial appliance from any well made by boring or drilling into the rock, that class of waters holding in solution mineral salts and an excess of carbonic acid gas or pumping or by any artificial contrivance whatsoever in any manner producing an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful.”

This provision has been upheld as a valid regulation of the acts of those desiring to use mineral waters like those at Saratoga Springs and entitled to draw from a common source of supply in seeking to reduce them to possession so as to prevent unreasonable impairment of their mutual rights, as well as the rights of the public, by securing a just distribution among them and preventing waste.

This is the doctrine of the case of *Hathorn* against *Natural Carbonic Gas Company*, decided in February, 1909, and reported in 194 N. Y., p. 326.

When the statute again came before the court for its consideration in the following November, the court went further in defining and limiting the operation of the act. It then declared the doctrine of reasonable use to be applicable to percolating waters like those described in the statute and that the operation of the act

was limited to cases of unreasonable use and that the use of such waters for purposes disconnected with the land, which impaired the equal enjoyment of others dependent upon a common source of supply, were within the scope of proper legislative regulation under the police power.

People v. N. Y. Carbonic Acid Gas Co.,  
196 N. Y. 421.

The act as thus construed must stand upon a foundation of facts relating to the waters to which it is to be applied that renders it proof against all possible attack upon constitutional grounds.

This construction assumes, among other things, a water of peculiar medicinal character, a source of supply common to many different landowners, a limited supply of such waters, an unreasonable draft by some of the common owners and injury or depletion of the wells or springs of others.

The complainant in its bill of complaint has negatived none of these facts. They must, therefore, be assumed in support of the fact, for the act is to be presumed valid and all facts to sustain its validity must be presumed to exist in the absence of proof to the contrary.

Henderson Bridge Co. v. Henderson City,  
173 U. S. 592, 615.

Brandon v. Miller, 118 Fed. Rep. 361,  
362.

Buckdel v. Wilson, 204 U. S. 40.

The complainant alleges in his bill, it is true, that the pumps which his company uses

**"do not suck the gases or waters from the land or exercise any pervasive force therein or exercise**

any force of compulsion upon waters in or under adjoining lands but lift only to the surface such waters and gases as flow by reason of the laws of nature into the wells so made upon its property."

The fact that the pumps of this company possess the extraordinary characteristics ascribed to them by the complainant in no wise impugns the constitutionality of the enactment, which was intended to meet the usual and ordinary dangers incident to pumping in the manner described in the act, which are nowhere in the bill of complaint alleged to be other than the act assumes.

These dangers that arise from pumping wells like those of the complainant's company, which it alleges in its bill (fol. 15) to be several hundred feet deep, seem to be so obvious as to make the evidence of experts unnecessary but, at all events, the danger of pumping such wells generally is nowhere negatived in the bill.

The act, being well adapted to the generally prevailing conditions, cannot be impeached by allegations as to the character of the pumps of complainant's company any more than an act forbidding the discharge of firearms in a city could be impeached by an allegation on the part of one violating it that his guns were of such peculiar construction that they would not send a bullet across the boundary line of his own lot.

Moreover, the statement that the pumps of complainant's company "lift only to the surface such waters and gases as flow by reason of the laws of nature into the wells so made upon its property" is specious.

The natural flow of a gas well has been held to be the entire flow of gas that will issue from the mouth of a well when retarded only by the atmospheric press-

ure. (Richmond Natural Gas Co. v. Enterprise Natural Gas Co., 66 N. E. 782-786; 31 Ind. App. 222.)

This definition is equally applicable to a well yielding water and water and gas together.

But the volume of gas and water issuing from the mouth of a well several hundred feet deep is vastly different from the amount of water that would flow into the bottom of the same well if the column of water standing in the well should be lifted by a deep well pump and water from outside should be allowed to flow into the bottom of the well unretarded by the weight of the column of water within it. It requires no special knowledge to perceive that by such a process the flow into the bottom of the well would be enormously increased, although it would still take place by reason of the laws of nature.

It is by reason of the laws of nature that the soil of one's lot slides into his neighbor's pit when the latter digs deep next to his boundary line and takes away the lateral support to which one is entitled.

So it is in strict accordance with the laws of nature that a lofty building in a city when its lower parts are burned sometimes topples over upon the lowly structures of its neighbors and crushes them.

It is true, therefore, that none of the facts which serve as a foundation for the act under consideration are negatived by the complainant in his bill and, at least until such facts are negatived, they must be presumed to exist and support the act.

As the Supreme Court of Appeals of West Virginia said in the case of Peel Splint Co. v. West Virginia, 36 W. Va. 302:

"If any conceivable circumstances would justify the exercise of such police power, the Legislature and not the Courts is to judge of the existence or prevalence of such circumstances."

And, in the language of Chief Justice Waite in *Munn v. Illinois*, 94 U. S. 113, 132:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did."

It is not for one who asserts rights under a statute to prove, as a condition precedent to its enforcement, that the Legislature had the right to enact it. He may stand upon the presumption of validity until such presumption is overthrown.

This principle is recognized by a uniform current of authority.

Judge Willard, in *Beecher v. Allen*, 5 Barb. 169-171, said:

"The court ought not rashly to presume that the legislature in the enacting of any law has transcended its powers. The presumption is the other way."

Judge Church in *People ex rel. City of Rochester v. Briggs*, 50 N. Y. 533-558, said:

"Every presumption is in favor of the validity of legislative acts and they are to be upheld unless there is a substantial departure from the organic law."



Judge Denio, in *The People v. Simeon Draper*, 15 N. Y. 532-543, said:

"Before proceeding to the other grounds of objection, it will be useful to state certain principles which, though not controverted, have sometimes been overlooked in this argument. In the first place, the People, in framing the Constitution, committed to the legislature the whole law making power of the state which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional it is for those who question its validity to show that it is forbidden."

Judge Peckham, in *People ex rel. Carter v. Rice*, 135 N. Y. 437-484, said:

"Before courts will deem it their duty to declare an act of the legislature void as in violation of some provision of the constitution, a case must be presented in which there can be no rational doubt. The incompatibility of the legislative enactment with the constitution must be manifest and unequivocal. Judge Denio in *People v. Draper* (15 N. Y. 546), expresses the rule in substantially the above language. There is no doubt of its correctness and I have heard no counsel who have challenged it."

Judge Martin, in *People ex rel. Sturgis v. Fallon*, 152 N. Y. 1-11, said:

"In the language of Allen, J., in *People ex rel. Bolton v. Albertson*, 55 N. Y. 50-54, the courts

do not sit in review of the discretion of the legislature or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the legislature. Every intendment is in favor of the validity of statutes."

This principle has been carried beyond acts of State legislatures and applied to local legislative bodies. In the case of *Cronin v. People of the State of New York* (82 N. Y. 318-323), it was applied to a municipal ordinance of the city of Albany; and in this case, Judge Finch, writing the opinion of the court, at page 323, said:

"If we correctly understand the counsel for the appellant, he also claims that the ordinance is void because it punishes the prohibited acts without pretense of any form of proof that they were injurious to the well being of the town or that prudence required its passage. The answer is that neither in the ordinance itself nor in the indictment founded upon it is it necessary to allege or explain the reasons for its enactment or the exigency out of which it grew. It is of the nature of legislative bodies to judge for themselves and the fact and the exercise of that judgment is to be implied from the law itself."

It is plain, therefore, that the plaintiffs in the present actions were not required "to allege or explain the reasons" for the enactment of the statute in question "or the exigency out of which it grew." The law itself implies a reason and an exigency and they are to be presumed until their nonexistence is shown.

Nor is the presumption of the validity a light presumption easy to be brushed aside by the court if its

views of the exigency of the situation do not accord with those of the Legislature.

In *Granger v. Douglas Park Jockey Club*, 148 Fed. 513, in a learned discussion of the right of a court to inquire into the wisdom and necessity of the exercise by a state legislature of the police power, the court said, at page 533:

"This brings us to another fundamental principle embodied in the decisions cited and referred to. It is this: A court has no right to invalidate or overthrow legislation depriving a person of his liberty or property or making a discrimination as to the persons to whom it is applicable simply because it believes to a certain degree that it has no real or substantial relation to the public welfare. Something more than this is required in order to warrant its interference. That something more is that it must be palpably clear that the legislation in question has no real or substantial relation thereto. The Legislature or local assembly acting under its authority is the governing body of the State or that portion thereof. It is its primary duty to determine what the public welfare demands, and every presumption must be indulged in its favor. It follows, therefore, that unless it is palpably clear that its determination is wrong it must be allowed to stand. Many quotations could be made in support of this position. \* \* \*"

And again, at page 534, this language was used:

"If then, in a given case the court must admit that it is possible for a reasonable man to conceive that the legislation in question may subserve the public welfare, it must leave it alone."

In *McLean v. Arkansas*, 211 U. S. 547, Mr. Justice Day, in delivering the opinion of the court, said:

“The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, 197 U. S. 11; *Mugler v. Kansas*, 123 id. 623; *Minnesota v. Barber*, 136 id. 313, 320; *Atkin v. Kansas*, 191 id. 207, 223.”

By all these authorities it must at least be sufficiently established that the act under consideration cannot be successfully assailed without negating any of the circumstances and conditions that show it to be a valid and constitutional enactment, to regulate the acts of persons seeking to reduce to possession natural mineral waters of great medicinal value, from a common, limited source of supply, so as to secure a just distribution thereof and to prevent their waste.

## VI.

THE DECREE APPEALED FROM SHOULD BE AFFIRMED.

The complainant having alleged no facts that show his right to assert or enforce the corporate rights of the Natural Carbonic Gas Company in this suit; the suit being in effect a suit against one of the United States by a citizen of another State; the act of the

Legislature of the State of New York whose constitutionality is assailed appearing to be a constitutional enactment and the presumption of its constitutionality not being disturbed by any allegations of fact contained in the bill of complaint, the decree of the court below dismissing the bill should be affirmed.

EDWARD R. O'MALLEY,  
*Attorney-General of the State  
of New York, Albany,  
N. Y.*

CHARLES C. LESTER,  
*Counsel for Defendant, James  
D. McNulty, et al., 360  
Broadway, Saratoga Springs,  
N. Y.*

NASH ROCKWOOD,  
*Counsel for Defendant, Hath-  
orn, et al., 378 Broadway,  
Saratoga Springs, N. Y.*

## INDEX.

---

	PAGE.
Statement . . . . .	1
Abstract of bill of complaint. . . . .	1
Abstract of demurrers. . . . .	4

### POINT I.

No right shown in complainant. . . . .	6
He is not shown to be either a stockholder or bondholder of defendant corporation. . .	6
Nor is any valid assumption of bonds of pre- vious company shown. . . . .	8
Complainant as a stockholder fails to comply with equity rule 94. . . . .	9
And as a creditor shows no reason for usurp- ing the functions of the corporate authori- ties . . . . .	16

### POINT II.

The suit is by an individual against a state. . . . .	20
And contravenes the eleventh amendment. . .	20

### POINT III.

The interpretation of the State courts is conclusive. . . . .	22
The act has been construed by the Court of Appeals . . . . .	23
And such interpretation is final. . . . .	27

### POINT IV.

The act in question is constitutional. . . . .	28
Its constitutionality has been affirmed by the Court of Appeals. . . . .	28

	PAGE.
<b>First.</b> The doctrine of reasonable use is well settled in New York.....	30
It is a State and not a Federal doctrine .....	33
And founded on the familiar theory of common ownership.....	33
As further illustrated in game laws.	37
<b>Second.</b> The act does not violate the right of the equal protection of the laws...	40
(a) It creates no class of persons nor any favored class .....	40
(b) The classification of wells is a reasonable one.....	47
Because the gas is confined in the rock.....	47
Pumping deep wells is more dangerous to others .....	48
(c) Classification arising from application to wasteful use .....	51
<b>Third.</b> Act valid under police power.....	52
It invades no property rights.....	52
With its wisdom the courts have no concern .....	62
<b>Fourth.</b> The public interest is sufficient to sustain the act.....	66
<b>Fifth.</b> The act is reasonable.....	74

#### POINT V.

The presumption of constitutionality is not impaired .....	76
The act as construed rests on a basis of fact which the bill has not assailed.....	78

The extraordinary character of the pumps of the defendant does not affect it.....	79
Operation of natural laws set in motion by artificial causes . . . . .	80

## POINT VI.

The decree should be affirmed.....	85
------------------------------------	----